Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Donald Asher,
Petitioner

v.

Chase Bank USA, N.A.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALSFOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Like millions of Americans, Petitioner Donald Asher is a victim of credit card fraud. His employee of twenty years, Carol Mackenzie, entered his Chase Bank USA, N.A. ("Chase") credit card number into her business's credit card equipment while concealing the charges for over three years. Respondent Chase, as the issuing bank, billed and collected the amounts Mackenzie stole from Asher in this manner. Upon discovery of the fraud, Asher requested Chase to reimburse him for the amounts charged. Chase has refused. It is in this context that Asher presents the following questions for review:

I. Whether credit card charges are not "unauthorized" as a matter of law under the Truth In Lending Act ("TILA"), 15 U.S.C.A. § 1601 *et seq.*, and Regulation Z, when the purported apparent agent never used the principal's credit card to process the charges nor entered into valid contracts.

II. Whether a credit card issuer breached its contractual duties when it enforced credit transactions resulting from void contracts upon a cardholder.

PARTIES TO THE PROCEEDING

Petitioner is an individual, Donald Asher. Respondent is Chase. The initial case was filed against Bank One; since that time, Chase acquired Bank One. According to Respondent's Disclosure Statements provided to the Court of Appeals for the Seventh Circuit, JP Morgan Chase & Co. owns 10% or more of the Respondent's stock. Carol Mackenzie is an individual who was a Defendant in the early stages of the proceeding. The matter was dismissed against her for want of prosecution. This appeal does not involve her participation as a party to the proceedings.

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JURISDICTIONAL STATEMENT

The Seventh Circuit entered its order February 20, 2009. Pet.App. Ex. C. Asher's timely-filed Petition for Rehearing was denied on April 1, 2009. Pet.App. Ex. E. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C.A. § 1254(1).

RELEVANT STATUTORY PROVISIONS

This matter presents issues involving the Truth In Lending Act, 15 U.S.C.A. § 1601, *et seq*, and its enforcement under Regulation Z, 12 C.F.R. § 226.1, *et seq*. Relevant statutory provisions are presented in their entirety at Pet.App. Ex. F.

STATEMENT OF THE CASE

Facts

Carol Mackenzie worked as Asher's personal secretary for over twenty years before her termination in March 2004. Dkt. #52, Ex. B, pp. 31-33; Dkt #52, Ex. D, pp. 11-12. Part of her responsibilities included preparing Asher's Chase credit card statements for review.[1] Dkt. #52, Ex. D, pp. 34, 36, 38, and 155. Mackenzie would attach receipts, if she had them, pertaining to the individual charges on the credit card statement and draw a line through the individual charge corresponding to the receipt on the statement. Dkt. #52, Ex. D, pp. 34, 36, 38, and 155. Asher reviewed the charges on his Chase statement that were not stricken by Mackenzie to insure their propriety. Pet.App. Ex. A. Mackenzie prepared checks for the amount of the Chase statements. Pet.App. Ex. A. Asher, his mother, or his brother would sign the checks, and they would be remitted to Chase for payment. Pet.App. Ex. A.

Mackenzie opened her own business, A Sign of the Tymes ("Tymes"), in May 1999. Pet.App. Ex. A. She obtained credit card equipment to process credit card transactions relating to her business. Pet.App. Ex. A. Asher was unaware that Mackenzie operated the Tymes business. Dkt #52, Ex. D, pp. 34, 36, 38, and 155.

Beginning in February 2001, Mackenzie began fraudulently charging sales to Asher. Pet.App. Ex. C. Unbeknownst to him, she would manually enter Asher's credit card number into

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[1] Another bank initially issued the credit card at issue. Chase eventually reissued the credit card to Asher.

the credit card equipment. Dkt. #52, Ex. B, pp. 27-29, 168-169. Asher did not receive any goods in the transaction. Dkt. #52, Ex. B, pp. 75, 77, and 147-149. He did not authorize her to utilize the credit card in any capacity, whether in the scope of her employment or otherwise. Dkt. #52, Ex. B, pp. 75, 77, and 147-149. She never possessed Asher's credit card; she did not actually use his credit card to process the charges. Dkt. # 52, Ex. D, pp. 68-70, 74-75, 102-103, 120, 166, and 175. She never produced sales receipts for the charges. Dkt. # 52, Ex. D, pp. 68-70, 74-75, 102-103, 120, 166, and 175.

To conceal her crimes, Mackenzie crossed out the Tymes charges on Asher's credit card statement. Dkt. #52, Ex. D, pp. 34, 36, 38, and 155. Asher or a member of his family signed checks to pay the Chase credit card statements, including the hidden Tymes transactions. Pet.App. Ex. A. Over the course of three years, Mackenzie charged approximately $77,655 by manually entering his credit card number into the credit card equipment she maintained in her home.[2] Pet.App. Ex. A.

In March 2004, Asher discovered Mackenzie's scheme when Chase contacted him concerning excess charges on his account. Dkt. # 52, Ex. B, pp. 27-29, 168-169. He contacted John Oketta, Chase's anti-fraud operations agent, on March 9, 2004 and requested reimbursement for the fraudulent Tymes charges. Pet.App. Ex. C. Without any contact with Mackenzie, Chase concluded that the charges were not the result of

[2] Mackenzie eventually pled guilty to theft.

unauthorized use of Asher's credit card. Dkt. #52, Ex. I, pp. 270-274.

Asher protested, based on these facts: he never authorized the Tymes charges; he had never relinquished control over his credit card; and he was never aware of the Tymes transactions. Pet.App. Ex. C. Chase responded by continuing its investigation, including requesting another affidavit of fraud from him in September 2004. Pet.App. Ex. C. Finally, in a letter dated October 15, 2004, but postmarked January 28, 2005, Chase informed Asher it was holding him liable for the entire amount of the Tymes charges. Pet.App. Ex. C. Simultaneously, Chase re-charged Asher $16,785, an amount Chase previously returned to him for fraudulent Tymes charges. Pet.App. Ex. C.

The Contractual Relationships

The process by which Chase held Asher liable for Mackenzie's fraudulent charges is administered by three contract arrangements. In a typical transaction, the cardholder's use of the credit card in purchasing goods or services from the merchant creates an account receivable. An acquiring bank purchases that receivable from the merchant. The acquiring bank sells the receivable to an issuing bank that collects from the cardholder through a cardholder agreement.

To process credit card transactions for Tymes, Mackenzie signed a merchant agreement with PMT/Imperial Bank. Pet.App. Ex. C. PMT/Imperial is a member of VISA U.S.A, Inc. ("VISA system") as an acquiring bank. Dkt. #62, Ex. J, pp. M96-M100. Mackenzie entered Asher's

credit card number into processing equipment for the fraudulent sales. Dkt. # 52, Ex. D, pp. 68-70, 74-75, 102-103, 120, 166, and 175. After Chase approved the transactions, PMT/Imperial deposited monies into her checking account. Dkt. # 52, Ex. D, pp. 76-79, 160-164, 182-183. PMT/Imperial received Mackenzie's rights to collect the debts the credit transactions evinced. In other words, PMT/Imperial purchased the accounts receivable from Mackenzie.

PMT/Imperial sold the receivables, created by Mackenzie, to Chase, who received PMT/Imperial's rights under them. Dkt. # 52, Ex. I, pp. 56-65, 68, 154-155, and 162. Chase is a member of the VISA system as an issuing bank. Dkt. # 52, Ex. I, pp. 56-65, 68, 154-155, and 162. Chase would bill and collect the receivables from Asher under its cardholder agreement with him. Dkt. # 52, Ex. I, pp. 56-65, 68, 154-155, and 162.

Chase's and PMT/Imperial's contractual relationship for the sale of credit card receivables is defined by their memberships in the VISA system. In order to become a member of the VISA system, Chase and PMT/Imperial agreed to abide by the VISA By-laws and Operating Regulations (collectively, "By-Laws"). Pet.App. Ex. H. The By-Laws set forth Chase's and PMT/Imperial's contractual responsibilities as intermediaries of the credit transactions. In relevant part, they provide: the use of an account number where the card is not present is a category of fraudulent activity; a member must conduct a thorough investigation of the suspected or confirmed loss or theft of account information or laundering of sales

drafts; an issuing bank may chargeback a fraudulent transaction to an acquiring bank; and if the issuer has billed the cardholder for the fraud, it must credit the cardholder the chargeback amount. Pet.App. Ex. H. The By-laws help to insure the integrity of credit card transactions by instilling protections for the benefit of all its members and the cardholders who initiate the transactions. Pet.App. Ex. H.

Procedural History

Asher sued Chase in the Circuit Court of Cook County in September 2005, alleging TILA violations in Count I and breach of contract in Count II. Pet.App. Ex. C. Count I is based on Chase's refusal to reimburse Asher for fraudulent transactions charged to his credit card. Pet.App. Ex. A. In Count II, Asher alleged two theories of contract liability. Chase's actions to charge Asher for the Tymes transactions constitute a breach of its cardholder agreement with him. Pet.App. Ex. B. In addition, he was a third-party beneficiary of Chase's contractual agreement to abide by the By-Laws. Pet.App. Ex. C. Chase breached its contractual duties when it failed to determine the validity of charges it assessed on his statement and when it charged Asher for the Tymes transactions when it knew they were fraudulent. Pet.App. Ex. C.

Chase removed the case to the Northern District Court of Illinois pursuant to 28 U.S.C.A. § 1441. Pet.App. Ex. C. In regard to the TILA count, the proper basis for jurisdiction was 28 U.S.C.A. § 1331. Asher's breach of contract claim

was properly before the court pursuant to 28 U.S.C.A. § 1367.

In discovery, Asher requested production of documents from Chase relevant to the contractual relationships among Tymes, PMT/Imperial, Chase, VISA, and himself. Specifically, he requested all documents relating to Chase's contract with VISA and Asher's cardholder agreement. Asher sought and received three orders from the district court compelling Chase to produce the requested documents. Chase never produced the requested documents.

In October 2007, Chase moved for summary judgment on both counts. It argued TILA's one-year statute of limitations barred Count I. Also, Chase did not breach any contract duties by charging Asher for the Tymes transactions because they were not unauthorized by Asher. Asher's payments of the Tymes charges granted apparent authority in Mackenzie, making the transactions authorized. The district court granted summary judgment on Count I, holding as a matter of law Asher's claim was time-barred pursuant to the one-year statute of limitations codified in 15 U.S.C.A. § 1640 (e). Pet.App. Ex. A. It denied Chase's summary judgment motion with regard to Count II, declining to adopt Chase's apparent authority arguments to the contract claim. It subsequently denied Chase's motion for reconsideration, which argued the entire complaint "is barred as a matter of fact and law given the undisputed evidence of authorized use—an issue fully developed, briefed and argued in the parties' memoranda and other papers submitted

in support of and in opposition to Chase's motion for summary judgment".[3] Pet.App. Ex. D.

On March 12, 2008, Chase again moved for summary judgment on Count II. Asher filed his cross-motion for summary judgment on Count II on April 6, 2008. The court granted Chase's motion and denied Asher's motion, stating Asher had not presented enough evidence of a contract to withstand the motion. Pet.App. Ex. B.

Asher appealed the dismissal of Counts I and II to the Seventh Circuit. Its appellate jurisdiction was based upon 28 U.S.C §§ 1291 and 1294(1). While affirming, the Seventh Circuit relied on different legal reasons. In regard to Count I, the Seventh Circuit reversed the district court's statute of limitations analysis, but affirmed the summary judgment based upon the existence of apparent authority in Mackenzie to enter into the fraudulent transactions. Pet.App. Ex. C. For Count II, the Seventh Circuit affirmed the holding that Asher had not presented sufficient evidence of a breach of a direct contract relationship. While noting the district court made no findings in relation to Asher's third party beneficiary argument, it stated Asher had not presented enough evidence of his rights under Chase's membership agreement in the VISA system. Pet.App. Ex. C.

ARGUMENT FOR ALLOWANCE OF WRIT

Introduction

Credit card fraud and identity theft have become pervasive in American society. According

[3] The quoted material is taken from Chase's Motion to Reconsider.

to research conducted for the Federal Trade Commission ("FTC"), 8.3 American adults were the victims of some type of identity theft in 2005. FTC 2006 Identity Theft Survey Report, pp. 3 and 11 (Nov. 2007).[4] Ten percent of victims report suffering out of pocket expenses exceeding $1,200, and spending 55 hours or more resolving the identity theft. FTC 2006 Identity Theft Survey Report, p. 6 (Nov. 2007). The Identity Theft Resource Center, a non-profit organization that monitors identity fraud, predicted credit card fraud was likely to increase in 2009.[5]

Recognizing the risks involved in consumer credit transactions, Congress enacted TILA. The purpose of TILA is to "promote the 'informed use of credit' by consumers." *Household Credit Serv's, Inc. v. Pfennig*, 541 U.S. 232, 235, 124 S. Ct. 1741, 1744, 158 L. Ed. 2d 450, 457 (2004). The credit card provisions of TILA were enacted "in large measure to protect credit cardholders from unauthorized use perpetrated by those able to obtain possession of a card from its original owner." S. Rep. No. 91-739, at 1 (1970); 116 Cong. Rec. 11, 827-29 (1970). TILA places primary liability for fraud losses on issuers rather than cardholders, reversing a long-standing abuse in the credit card industry. John C. Weistart, *Consumer Protection in the Credit Card Industry: Federal Legislative Controls*, 70 Mich. L. Rev.

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[4] The report is available at: http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf.

[5] http://www.idtheftcenter.org/artman2/publish/m_press/Identity_Theft_Predictions_2009.shtml

1475, 1508 (1972). Congress passed TILA as a consumer protection act, *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 363, 93 S. Ct. 1652, 1657-58, 36 L. Ed. 2d 318, 326-27 (1973), and its provisions, as well as Regulation Z, are remedial legislation, to be construed broadly in favor of consumers. *Rand Corp. v. Yer Song Moua*, 559 F.3d 842, 845 (8th Cir. 2009); see also *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 727 (7th Cir. 2004) (citations omitted).

TILA strictly limits a cardholder's liability for unauthorized transactions, and places the burden on the issuer to establish cardholder liability. 15 U.S.C.A. § 1643 (a) and (b) (West 1998); Pet. App., Ex. F. The protections outlined in § 1643 only arise when there is "unauthorized use of a credit card". *Id. Unauthorized use* means use of a credit card by a person other than a cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit. 15 U.S.C.A. § 1602 (o) (West 1998); Pet. App., Ex. F; Regulation Z, 12 C.F.R. § 226.12 (b), n.22; Pet. App., Ex. F.

Recently, and in contravention of TILA's purpose, courts have been more apt to protect card issuers rather than cardholders. Application of the "unauthorized use" limitations in TILA and Regulation Z has been inconsistent, exemplifying a need for the Supreme Court's guidance. The courts' opinions do share one trait: a gradual judicial abatement of both the letter and philosophy of TILA. In order to end the continuous "erosion" of TILA as a consumer protection statute, (see Francis J. Facciolo,

Unauthorized Payment Transactions and Who Should Bear the Losses, 83 Chi.-Kent L. Rev. 605, 616-618 (2008)), the Supreme Court should provide direction with the aim of reemphasizing the purpose of TILA, namely the protection of consumers. At the same time, a definitive statement from the Supreme Court will establish consistent application of TILA, something that has been missing in the federal courts. A summary of recent case law illustrates the confusion in the federal courts regarding TILA.

A cardholder grants apparent authority to a user when she gives the user unrestricted access to the credit card, when industry customs give no indication to third parties that the charges were unauthorized, and the cardholder fails notify third parties of the user's limited authority. *Towers World Airways v. PHH Aviation Sys. Inc.*, 933 F.2d 174, 178 (2nd Cir 1991).

A cardholder's failure to examine credit card statements that would have revealed fraudulent use of the card creates apparent authority in the user such that the use is not unauthorized under TILA. *Minskoff v. Am. Ex. Travel Related Serv. Co.*, 98 F.3d 703, 709-710 (2nd Cir. 1996).

While failure to inspect billing receipts does not cloak an agent with apparent authority, paying a user's charges after receiving notice creates apparent authority. *DBI Architects P.C. v. Am. Ex. Travel Related Serv. Co.*, 388 F.3d 886, 891 (D.C. Cir. 2004). The determination of when a cardholder cloaks her agent in apparent

authority defines the extent of her liability. *DBI*, 388 F.3d at 894.

More recently, two district courts have attempted to navigate the issue of apparent authority, ending up on opposite sides of the coin. A user who fraudulently obtains and uses a credit card is cloaked in apparent authority when a cardholder does not review her credit card statements during a two-year period while continuing to pay the charges without protest. *Carrier v. Citibank (S.D.) N.A.*, 383 F.Supp.2d 334, 340 (D. Conn. 2005), aff'd, 180 Fed.App'x 296, 296-297 (2nd Cir. 2006). In contrast, apparent authority cannot be determined as matter of law despite a cardholder's payment of a user's fraudulent charges posted on the credit card statement. *Permobil Inc. v. Am. Ex. Travel Related Serv's Co. Inc.*, 571 F.Supp.2d 825, 835 (M.D. TN 2008).

This matter represents the greatest extension of protection for credit card issuers yet. Relying primarily on *DBI*, the Seventh Circuit held Asher's payments made a "compelling case" for the conclusion that Mackenzie had apparent authority as a matter of law. Pet.App. Ex. C. It ignored the factual distinctions between the cases, notably: (1) the Tymes transactions never created contracts because consideration was absent, the transactions were fraudulent, and the transactions were illegal, and (2) Mackenzie, the person held to be an apparent agent in this case, never possessed or used Asher's credit card. After holding the payments were paramount, the Seventh Circuit then parted with *DBI*, which

remanded to determine when apparent authority arose. Because Asher never raised the issue of when apparent authority arose, such a determination was unnecessary.

Thus, the judicial abbreviation of TILA's consumer protection goals continues. Now, a person does not need to actually use a cardholder's credit card nor does a person need to enter into a valid contract for the cardholder to be held liable under apparent authority. Also, it is the cardholder's burden to establish when and if apparent authority arose.

These holdings frame the issues of this Petition. Consumers and cardholders need the Supreme Court to elucidate what actions will definitively create apparent agency such that issuers may hold cardholders liable for otherwise unauthorized and, in this case, fraudulent charges. Federal courts have continually misapplied apparent authority to insulate card issuers from liability. The Seventh Circuit's application of apparent authority both directly conflicts with Illinois law regarding apparent authority and transforms TILA, a consumer protection statute, into a justification for credit card issuers to assign the cost of credit card fraud to cardholders.

A definitive statement as to the application of TILA will allow courts, cardholders, and card issuers to more effectively implement the goals of TILA. The importance and pervasiveness of the issue warrant the Court's immediate resolution. In this context, Asher respectfully requests the Supreme Court to issue a writ of certiorari.

I. Whether credit card charges are not "unauthorized" as a matter of law under TILA, 15 U.S.C.A. § 1601 *et seq.*, and Regulation Z, when the purported apparent agent never used the principal's credit card to process the charges nor entered into valid contracts.

The procedural history warrants a discussion of the legal standard for summary judgments. A summary judgment should be granted only when the pleadings, depositions, interrogatories, admissions, and affidavits show that there is no issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265, 273 (1986). A party opposing summary judgment is required to set out specific facts showing a genuine issue of fact for trial only when the movant has otherwise established entitlement to judgment as a matter of law. *Zenith Elec. Corp. v. PDI Communications Sys. Inc.*, 522 F.3d 1348 (7th Cir. 2008). The review of a grant of summary judgment is *de novo*, drawing all reasonable inferences from the record in a light most favorable to the non-moving party. *Johnson v. Runyon*, 47 F.3d 911, 917 (7th Cir. 1986).

A. Chase never established "use of a credit card" which precludes holding the Tymes charges were not unauthorized under TILA and Regulation Z.

The Seventh Circuit held the fraudulent Tymes transactions charged to Asher's credit card were not unauthorized under TILA and

Regulation Z. Pet.App. Ex. C. The court's citation to TILA omits a critical portion of the statute: "Section 1602 (o) defines 'unauthorized use' as use 'by a person other than the cardholder who does not have actual, implied, or apparent authority for such use.' " Pet.App. Ex. C. There seems to be no logical reason for the abridged relation of 15 U.S.C.A. § 1602 (o).

In its entirety, § 1602 (o) states: "The term 'unauthorized use,' as used in section 1643 of this title, means a use **of a credit card** by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit." Pet.App. Ex. F. (Emphasis added.) [6] Regulation Z states: "*Unauthorized use* means the use **of a credit card** by a person, other than the cardholder, who does not have actual, implied, or apparent authority for such use, and from which the cardholder receives no benefit." Regulation Z, 12 C.F.R. § 226.12 (b), fn.22; Pet.App. Ex. F. (Emphasis added.) The Federal Reserve Board's ("the Board") official staff interpretation of Regulation Z states: "The cardholder may not be held liable under § 226.12 (b) when **the card itself** (or some other sufficient means of identification of the cardholder) is not presented." Federal Reserve Board Truth In Lending Official Staff Interpretation of Regulation Z, 12 C.F.R. Pt. 226, Supp. I, § 226.12, ¶ 12(b)(2)(iii)(3) ("FRB TILA Off."); Pet.App. Ex. G. (Emphasis added).

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[6] There has been no question raised regarding Asher receiving any benefit from the fraudulent charges; as the victim of theft, it is clear he did not.

Congress delegated expansive authority to the Board to promulgate regulations concerning the facilitation and enforcement of TILA. 28 U.S.C.A. § 1604 (West 1998); see also *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-67, 100 S. Ct. 790, 794, 63 L. Ed. 2d 22, 31-32 (1980).

The language "use of a credit card" is not arbitrary or permissive. When a statute's language is plain, the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce the statute according to its terms. *Dodd v. U.S.*, 545 U.S. 353, 359, 125 S. Ct. 2478, 2483, 162 L.Ed.2d 343, 350 (2005). Indeed, when a statute includes an explicit definition of a term, as here, the court of appeals must follow that definition. *Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S. Ct. 2597, 2615, 147 L. Ed. 2d 743, 766 (2000). It is axiomatic that the statutory definition of "unauthorized use" excludes unstated meanings of the term. *Colautti v. Franklin*, 439 U.S. 379, 392-93, fn.10, 99 S. Ct. 675, 684-85, fn.10, 58 L. Ed. 2d 596, 607, fn.10 (1979) TILA, Regulation Z, and the Board all mandate the use of a credit card for an issuer to impose liability on a cardholder.

There is no dispute regarding the use of Asher's credit card in this matter; there was none. Mackenzie did not consummate any of the fraudulent transactions with a credit card. Mackenzie never possessed his credit card. She entered his credit card number into credit processing equipment she acquired as part of her Tymes business. No trier of fact decided Mackenzie's actions amount to "use of a credit

card". Neither the district court nor the Seventh Circuit held entering credit card numbers into processing equipment is "use of a credit card" for TILA and Regulation Z. Such a holding itself would be irreconcilable with the language of the statute.

It seems elementary, but both § 1602 (o) and 12 C.F.R. § 226.12 require a party seeking to establish that credit card charges were not unauthorized under TILA and Regulation Z must establish the apparent agent's use of a credit card. Chase never established, and can never establish, Mackenzie's use of Asher's credit card. As such, it cannot establish Mackenzie's use of Asher's credit card was not unauthorized in order for it to avoid liability under TILA.

Additionally, the Board's interpretation plainly states Chase cannot hold Asher liable for transactions where his credit card was not presented. Absent some obvious repugnance to TILA itself, the Board's regulation implementing TILA should be accepted by the courts, as should the Board's interpretation of its own regulation. *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219-220, 101 S. Ct. 2266, 2274, 68 L. Ed. 2d 783, 794 (1981). The Board interprets TILA and Regulation Z to hold Chase, as the issuer, liable for the Tymes transactions because it did not fulfill its obligations for imposing liability on Asher, namely providing a means for identifying the user of the card. FRB TILA Off., 12 C.F.R. Pt. 226, Supp. I § 226.12, ¶¶ 12(b)(2)(iii)(1) and 12(b)(2)(iii)(3). Given the high degree of deference to the Board's interpretation of TILA, the absence of

any credit card use precludes Chase from assessing Asher for the Tymes transactions. When Chase charged Asher despite its knowing failure to fulfill its obligations to impose liability on him, it violated TILA.

The Seventh Circuit overlooked the basic issue of whether there was credit card use. Its abbreviated reference to § 1602 omits the element altogether. Given that TILA and Regulation Z require the use of a credit card, the Seventh Circuit's order is erroneous. In addition, its order directly clashes with the Board's pronouncement of the proper effect of transactions consummated without credit cards and who bears the risk for such transactions. The Seventh Circuit erroneously applied TILA and Regulation Z when it granted Chase summary judgment on Asher's TILA claim when Chase failed to establish the use of a credit card.

B. The Seventh Circuit erroneously applied Illinois agency law in relation to TILA and Regulation Z.

The Seventh Circuit dedicated a majority of its order to reversing the district court's TILA statute of limitations analysis, correctly holding Asher's claim was not time-barred. Pet.App. Ex. C. It then affirmed the grant of summary judgment on alternative grounds, namely that Asher cloaked Mackenzie with apparent authority. Relying on *DBI*, it stated Asher's payment of the fraudulent Tymes transactions bestowed apparent authority on Mackenzie to enter into the transactions on his behalf, such that Chase could hold Asher liable.

The Seventh Circuit's analysis is erroneous for several reasons: 1) there can never be apparent authority to enter into contracts void *ab initio*; 2) the Seventh Circuit's finding of fact that Asher cloaked Mackenzie in apparent agency is both procedurally and substantively erroneous; and 3) shifting the burden of proof as to when apparent agency arose is contrary to Illinois law.

1. If there is no contract, there can be no apparent authority to enter into that same contract.

The Board states "whether authority exists must be determined under state or other applicable law." FRB TILA Off., 12 C.F.R. Pt. 226, Supp. I § 226.12, ¶ 12(b)(1)(1); Pet. App., Ex. G. The parties agree Illinois law governs the existence of apparent authority here.

It is the Seventh Circuit who first decided apparent agency existed such that Asher was liable for the Tymes charges. While a court of appeal may affirm a grant of summary judgment on any sufficient basis in the record, *Wis. Cent., Ltd. v. Shannon,* 539 F.3d 751, 761 (7th Cir. 2008), the Seventh Circuit's cursory analysis combined with a record deficient in findings of fact to establish apparent agency make its affirmation erroneous.

Logically, before a contract may be authorized under apparent agency, there must be a valid contract. Consideration is essential to the validity of a contract. *GMAC v. Johnson*, 354 Ill.App.3d 885, 893, 822 N.E.2d 30, 37 (1st Dist. 2004). It is "a fundamental principle of contract law" that if the subject matter of a contract is illegal, that contract is void *ab initio*. *People v.*

Gregory, 379 Ill.App.3d 414, 420, 883 N.E.2d 762, 767 (4th Dist. 2008). A wrongdoer is precluded from enforcing an illegal contract because enforcement would make the courts an indirect participant in the wrongful conduct. *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill.2d 112, 121-22, 619 N.E.2d 732, 738 (Ill. 1993). A contract induced by fraud is voidable at the election of the defrauded party. *23-25 Bldg. P'ship v. Testa Produce, Inc.*, 381 Ill.App.3d 751, 757, 886 N.E.2d 1156, 1163 (1st Dist. 2008). Although the perpetrator of the fraud cannot enforce a voidable contract, the innocent party may rescind the contract. *Id.*

"A void contract is no contract at all; it binds no one and is a mere nullity. Thus, an action cannot be maintained on the contract, nor can the contract later be validated." *In re Donnay*, 184 B.R. 767, 784 (Bankr. D. Minn. 1995), citing, RESTATEMENT (SECOND) OF CONTRACTS, § 7, cmt. a (1981). "When a contract is void, it is as if it never existed." *Laborer's Pension Fund v. A&C Env.*, 301 F.3d 768, 779 (7th Cir. 2002). In particular, "void *ab initio*" means a bargain is null from the beginning, as from the first moment someone enters into the purported contract. Lord, WILLISTON ON CONTRACTS (4TH EDITION), §1:20 (2007). Chase's charges to Asher were the result of void contracts. There was no consideration for the Tymes charges. Mackenzie entered Asher's credit card number into credit card processing equipment to realize a theft from Asher. She committed fraud. The transactions were illegal in that they facilitated Mackenzie's theft. Asher, as

the innocent party, elected to hold the contracts void. Arguably, the core of this matter is Chase's refusal to accept Asher's exercise of this right. In sum, the transactions are void contracts because: 1) there was no consideration exchanged; 2) the contracts themselves were illegal in that they facilitated criminal activity; and 3) the transactions occurred as a result of fraud and Asher exercised his right to avoid them.

This begs the question: If the contracts are void *ab initio*, what did Asher authorize Mackenzie to do under apparent agency principles? The void status of the contracts makes moot any discussion relating to apparent agency. Even if he desired to do so, the law of contracts prevents Asher from granting Mackenzie the authority to enter into contracts void because of fraud, illegality, and lack of consideration. *Donnay*, 184 B.R. at 784; RESTATEMENT (SECOND) OF CONTRACTS, § 7, cmt. a. The Seventh Circuit's holding that Asher authorized Mackenzie to enter into void contracts with Tymes is directly contrary to Illinois law.

2. The Seventh Circuit's finding of fact that Mackenzie was Asher's apparent agent is both procedurally and substantively erroneous.

While devoting no time to the threshold analysis of the existence of enforceable contracts, the Seventh Circuit briefly, but incompletely, discussed apparent authority. It decided as a matter of law that Asher cloaked Mackenzie in apparent authority when agency is generally a question of fact, when the district court made no findings of fact to establish apparent agency as a

matter of law, and when no trier of fact determined the existence of apparent agency. Pet.App. Ex. C. While the court purported to follow the D.C. Circuit in *DBI*, the existence of void contracts and the absence of any credit card use distinguish this matter.

Apparent authority arises when the principal's words or conduct cause a third person to reasonably believe the putative agent's conduct on the principal's behalf is authorized. *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill.2d 147, 184, 854 N.E.2d 635, 655-656 (Ill. 2006) (citations omitted). The existence and scope of an agency relationship are questions of fact, to be decided by the trier of fact. *Santana v. State Bd. of Elections*, 371 Ill.App.3d 1044, 1054, 864 N.E.2d 944, 952 (1st Dist. 2007). To prove apparent authority, one must demonstrate that: 1) the principal consented to or knowingly acquiesced in the agent's exercise of authority; 2) based on the actions of the principal and agent, the third person reasonably concluded that an agency relationship existed; and 3) the third person justifiably relied on the agent's apparent authority to his detriment. *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill.App.3d 395, 404, 865 N.E. 2d 385, 393, (1st Dist 2007). The burden of proving the existence and scope of an agency relationship is on the party seeking to charge the alleged principal. *Oliveira-Brooks v. Re/Max. Int'l Inc.*, 372 Ill.App.3d 127, 134, 865 N.E.2d 252, 258 (1st Dist. 2007).

Whether Asher cloaked Mackenzie in apparent authority and the scope of that apparent

authority are questions of fact under Illinois law. A trier of fact never determined these issues. The district court never decided the apparent agency issues either. It based its dismissal of the TILA claim on the expiration of the statute of limitations, subsequently reversed by the court of appeals. The first court to determine the factual issues of Mackenzie's apparent authority was the Seventh Circuit.

The courts of appeal are not proper forums for such fact-finding. *Icicle Seafoods, Inc. v. Worthington*, 474 U.S. 709, 714, 106 S. Ct. 1527, 1530, 89 L. Ed. 2d 739, 744 (1986). In *Worthington*, employees sued their employer to recover overtime benefits under federal statute. *Worthington*, 474 U.S. at 710, 106 S. Ct. at 1528, 89 L. Ed. 2d at 742. The district court determined the employees were excluded from overtime benefits because they were "seamen", an excluded class under the statute. *Id.* at 710-11, 106 S. Ct. at 1528-29, 89 L.Ed. 2d at 742-43. Under the guise of *de novo* review, the Ninth Circuit reversed the district court, finding the employees were not seamen "but instead industrial maintenance employees", an included class. *Id.* at 710 and 712, 106 S. Ct. at 1529, 89 L. Ed. 2d at 742. Nowhere did the Ninth Circuit mention any of the factual findings of the district court, "much less discuss or analyze them." *Id.* at 713, 106 S. Ct. at 1529, 89 L. Ed. 2d at 744.

In vacating, the Supreme Court stated "the Court of Appeals was mistaken to engage in such fact-finding." *Worthington*, 474 U.S. at 714, 106 S. Ct. at 1530, 89 L. Ed. 2d at 744. The Court

outlined the circuit court's options. It could remand to allow the district court to make additional factual findings; it could set aside the district court's findings under a clearly erroneous standard; or it could reverse the district court's application of the law to the facts. *Id.* at 714, 106 S. Ct. at 1530, 89 L. Ed. 2d at 744-745. The circuit court should not have made factual findings on its own. *Id.* at 714, 106 S. Ct. at 1530, 89 L. Ed. 2d at 745. Quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574-575, 105 S. Ct. 1504, 1512, 84 L. Ed. 2d 518, 529 (1985), the Court explained why courts of appeal are inappropriate arenas for findings of fact:

> "The rationale for the original finder of fact is not limited to the superiority of the trial judge's opinion to make credible determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."

Id. at 714, 106 S. Ct. at 1530, 89 L. Ed. 2d at 745.

Here, the Seventh Circuit engaged in the same conduct that the Supreme Court chastised in *Worthington*. Agency, its existence and scope, are questions of fact. *Santana*, 371 Ill.App.3d at 1054, 864 N.E.2d at 952. The district court made no findings of fact relating to apparent authority. As a result, the Seventh Circuit cannot cite to findings of fact regarding apparent agency. In

order to hold as it did, the Seventh Circuit was compelled to substitute its own factual finding that Mackenzie was Asher's agent in relation to the Tymes transactions. This step exceeded its authority and is proscribed by *Worthington*.

Even if the Seventh Circuit could determine apparent agency, its attempt to do so was so substantively erroneous as to be contrary to Illinois law. Relying on *DBI*, it held Asher's repeated payments of the fraudulent Tymes transactions led Chase to believe that Mackenzie had authority to make charges on his credit card. Pet.App. Ex. C. It overlooked two critical factual distinctions present in this matter: the lack of valid contracts and the absence of use of a credit card. While these facts are pivotal in explaining other errors, see *ante*, their existence serves as an independent reason to reverse. Also, it ignored the facts that advocate against the finding of apparent agency.

In *DBI*, Kathy Moore accumulated ~ $134,000 in unauthorized personal purchases on a credit card. *DBI*, 388 F.3d at 888. The purchases were for clothing, jewelry, travel, and other personal items. *Id.* Moore used corporate checks to pay both authorized and unauthorized charges. *Id.* The corporate cardholder could not avoid liability for Moore's charges because its payments in full after notice led the card issuer to believe Moore had apparent authority. *Id.* at 893.

The transactions in *DBI* were valid contracts. Moore contracted for the clothing, jewelry, travel, and other personal items. She received those items as consideration. In

exchange, she presented the corporate credit card. It can be assumed that she used a credit card for the transactions because she was a cardholder on the account and because the use of a credit card was not at issue in the case. The factual distinctions between *DBI* and this matter make the Seventh Circuit's reliance on *DBI* questionable.

Chase's conclusion of apparent agency had to be reasonable. *Career Concepts*, 372 Ill.App.3d at 404, 865 N.E.2d at 393.[7] There is a plethora of record facts that undermine Chase's ability to establish its reasonableness.

The absence of valid contracts, sales receipts, sales drafts, and the nonexistence of credit card use all call into question whether Chase reasonably concluded an agency relationship existed between Asher and Mackenzie such that the Tymes charges were authorized.

Chase has a $77,655 financial incentive to "reasonably" conclude there was an agency relationship.

The timing of Chase's announcement of its conclusion impeaches its assertion of an agency relationship. Chase first claimed it believed Asher cloaked Mackenzie in apparent authority only after Asher's demand for recompense and only after Asher informed Chase of Mackenzie's fraud. Chase's knowledge of Mackenzie's theft from Asher assails the genuineness of its belief. Indeed, Chase went so far as to credit Asher

[7] The Seventh Circuit neither supplied nor applied the three elements of an apparent agency analysis under Illinois law.

$16,785 to his account. It is doubtful Chase would have refunded any amount if it had believed there was authorization for the transactions.

Chase's paltry investigation into Asher's claims of fraud also rebuffs any claim of apparent authority. Before Chase imposed liability on Asher, it had to conduct a "reasonable investigation". 12 C.F.R. § 226.13 (f), fn.31; Pet. App., Ex. F; 12 C.F.R. Pt. 226, Supp. I, § 226.12, ¶ 12(b)(3); Pet. App., Ex. G. A reasonable investigation includes a determination that goods/services were actually delivered to the cardholder and a determination that the information the merchant provided to the issuer was correct. *Id.* In its investigation, Chase never made contact with Mackenzie.[8] It never verified the validity of the Tymes transactions. It never determined that the goods/services charged to Asher were in fact delivered to him. Yet, despite these omissions, Chase still determined Asher was liable. Chase's poor investigation undercuts any suggestion its conclusion was reasonable.

Chase knew TILA and Regulation Z required use of a credit card in order for a valid transaction to be incurred. TILA, Regulation Z, and the Board all impose on Chase the responsibility for ensuring the credit card user presents proper identification when a transaction is processed. Asher informed Chase his credit card was never out of his possession. Chase cannot reasonably conclude Asher authorized Mackenzie to enter into the Tymes transactions

[8] Notably, Chase produced no documentation relating to its "reasonable investigation" in discovery despite Asher's request.

when he never gave her possession of his credit card. Chase's failure to require identification at the time of the transaction rails against its reasonable conclusion of apparent agency.

At a minimum, there remain unsettled questions of fact concerning the existence of apparent agency and whether other motivations inspired Chase's beliefs. The facts preclude a determination as a matter of law that Asher cloaked Mackenzie in apparent authority. In a summary judgment, where the court makes reasonable inferences for Asher's benefit, *Johnson*, 47 F.3d at 917, it was erroneous to decide the issue against Asher.

3. The shifting of the burden of proof to Asher in the determination of when apparent authority arose is erroneous.

Indicative of its misinterpretation of agency law, the Seventh Circuit contradicted TILA and Illinois law by shifting the burden of proving the scope of Mackenzie's agency to Asher. Pet.App. Ex. C. Again, the scope of agency is a question of fact. *Santana*, 371 Ill.App.3d at 1054, 864 N.E.2d at 952. The burden of proving an agency relationship is on the party seeking to charge the alleged principal. *Oliveira-Brooks*, 372 Ill.App.3d at 134, 865 N.E.2d at 258.

To date, there has been no finding of fact, erroneous or otherwise, establishing when Asher cloaked Mackenzie in apparent authority. Rather than recognize the deficiency, the Seventh Circuit held Asher's reluctance to argue the point made the fact unnecessary to resolve the matter. Essentially, because Asher did not argue when he

cloaked Mackenzie in apparent authority, no determination was necessary. Pet.App. Ex. C.

Chase attempted to establish Mackenzie as Asher's agent, so that it could charge him with the fraudulent Tymes transactions. It was Chase's burden to prove the agency, including when that agency arose. The Seventh Circuit's statement that this matter required no such determination conflicts with Illinois law, TILA, and *DBI*, which remanded to determine when the agency arose. *DBI*, 388 F.3d at 894. On this record, there has been no finding of when apparent agency arose. This is Chase's fault to bear, as the proponent of apparent agency. Summary judgment cannot be granted when such a material fact remains unsettled.

II. Whether a card issuer breached its contractual duties when it enforced credit transactions resulting from void contracts upon a cardholder.

Asher presented two theories of contractual liability. Chase's charging the Tymes transactions to him breached his cardholder agreement and the Illinois law of factoring contracts that applied to the agreement. In addition, the factoring contract relationship among Tymes, PMT/Imperial, and Chase, quantified by the By-Laws, bestowed upon him third-party beneficiary status under Illinois law. Chase violated the By-Laws and the law of factoring contracts in two respects: (1) despite its knowledge of the charges' illegal and fraudulent nature, Chase refused to refund the amounts of the Tymes transactions to Asher and (2) it failed

to conduct a reasonable investigation to determine the validity of the Tymes transactions before charging Asher. The By-Laws require members to refund amounts charged as a result of fraud and theft. They also require members to conduct reasonable investigations when confronted with cardholders' claims of fraud. Chase's breach of the By-Laws caused Asher damages in the amount of the Tymes transactions.

The district court held Asher did not present sufficient evidence of Chase's direct contractual duties to withstand summary judgment. Pet.App. Ex. B. It made no reference to Asher's third-party beneficiary theory. The Seventh Circuit subsequently adopted the district court's assessment of Chase's direct contract liability. Pet.App. Ex. C. In addition, after noting "the district court did not address this theory of purported liability", it stated Asher did not produce "any" evidence at summary judgment to establish his third party beneficiary rights under the By-Laws.

A. The Seventh Circuit's Order mistakenly held Asher responsible for Chase's refusal to produce documents requested in discovery.

Chase admitted its direct contractual relationship with Asher, defined by its contract with VISA. Asher requested Chase to produce its contracts in discovery. Chase refused to produce it. Asher presented three separate motions to compel Chase to produce the VISA contracts. On February 14, 2007, the district court ordered Chase to produce all of the documents Asher requested or to state a reason why the document

should not be produced. Chase did not produce the documents. The district court granted Asher's two subsequent motions to compel production of the documents, on October 25, 2007 and November 6, 2007. Chase never produced the specific agreements. Then, it moved for, and received, summary judgment based upon Asher's inability to produce those agreements and other contractual terms.

The circumstances of the case present an absurd conclusion. Chase refuses to produce documents in discovery to Asher. The documents are relevant to Asher's theory of contract liability. Chase then moves for summary judgment, arguing that Asher has not provided sufficient evidence of Chase's contractual duties under the cardholder agreement or otherwise.

The grant of summary judgment and the subsequent affirmation both validate Chase's refusal to abide by the rules of discovery. They hold Asher responsible for Chase's refusal to produce documents by stating he did not provide sufficient evidence to establish Chase's direct contractual duties. Allowing parties to ignore the rules of discovery, then adopting their legal arguments based on those documents, is contrary to the philosophy of open discovery. It also rewards parties, like Chase, who refuse to follow the rules of discovery.

B. The Seventh Circuit misapplied Illinois contract law relating to factoring contracts in affirming the grant of summary judgment to Chase.

"Factoring" is defined as "[t]he buying of accounts receivable at a discount. The price is discounted because the factor (who buys them) assumes the risk of delay in collection and loss on the accounts receivable." Black's Law Dictionary, p. 630 (8th Edit. 2004). "In return for selling the accounts receivable at a discounted price, the seller receives two immediate advantages: (1) immediate access to cash; and (2) the factor assumes the risk of loss...Factoring can be accomplished either by an actual sale of accounts or through their assignment." *In re Straightline Invs.*, 525 F.3d 870, 876, fn.1 (9th Cir. 2008). The receivables are sold without recourse, so the factor cannot turn to the seller if they prove uncollectible. *Skylon Corp. v. Guilford Mills*, 864 F. Supp. 353, 354 (S.D. NY 1994). See, also, *US Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1264 (7th Cir. 1990) and *Central Nat'l Chicago Corp. v. Lumbermens Mut. Cas. Co.*, 45 Ill.App.3d 401, 405, 359 N.E.2d 797, 799-800 (1st Dist. 1977) (describing factoring under Illinois law).

(1) Direct Contract Liability

The law of contracts supplements the agreement between Chase and Asher. While it is true Chase's refusal to produce the contracts prevented Asher from citing specific provisions therein, Asher's direct contract claim is supported by the Illinois law of factoring contracts. In addition to the contracts, Asher's argument for direct contract liability roots from the relationship of the four players involved in the factoring contract.

As previously discussed, Mackenzie entered Asher's credit card number into processing equipment. Her acquiring bank, PMT/Imperial, paid her monies for the receivables created by her entry of the credit card number. PMT/Imperial then sold the accounts receivable to Chase, the issuing bank. Chase then charged and received payment from Asher. Chase's efforts to enforce the fraudulent receivables are governed by both the VISA agreement and the Illinois law of contracts. While Chase withheld the agreements, precluding citation to relevant portions therein, Illinois law still prevents Chase from holding Asher liable for the Tymes transactions. Chase's charging Asher for the Tymes transactions violated Illinois law.

Discussed *ante* in section I.B.1, there are no valid contracts between Asher and Tymes. Mackenzie created fictitious receivables and assigned the rights of collection of them to PMT/Imperial. PMT/Imperial then assigned its rights, still illusory, to collect the receivables to Chase. The threshold issue after these factoring transactions is what are Chase's rights of collection.

Because the original contracts were void *ab initio*, Chase has no rights of collection against Asher. The By-Laws governing the factoring arrangement presuppose this result by allowing Chase to chargeback PMT/Imperial for the purchase of accounts receivable initiated pursuant to void contracts. Pet.App. Ex. H. When Chase charged Asher for the Tymes transactions with no

contractual rights to do so, it violated the contracts.

Illinois law regarding contracts mandates this result. An assignment occurs when there is a transfer of some identifiable interest from the assignor to the assignee. *Brandon Apparel Group v. Kirkland & Ellis*, 382 Ill.App.3d 273, 283, 887 N.E.2d 748, 756 (1st Dist. 2008). A valid assignment "needs only to assign or transfer the whole or a part of some particular thing, debt, or chose in action and it must describe the subject matter of the assignment with sufficient particularity to render it capable of identification." *Klehm v. Grecian Chalet, Ltd.*, 164 Ill.App.3d 610, 616, 518 N.E.2d 187, 191 (1st Dist. 1987). An assignment operates to transfer to the assignee all the right, title or interest of the assignor in the thing assigned. *Owens v. McDermott, Will & Emery*, 316 Ill.App.3d 340, 350, 736 N.E.2d 145, 155 (1st Dist. 2000). "A basic principle of law applicable to all assignments is that they are void unless the assignor has either actually or potentially the thing which he attempts to assign." *Id.* An assignee "can obtain no greater right or interest than that possessed by the assignor." *Id.* Assignments are subject to the same requisites for validity as are other contracts, such as intent, mutuality of assent, capacity to contract, legal subject matter, and consideration. *Northwest Diversified Inc. v. Desai*, 353 Ill.App.3d 378, 387, 818 N.E.2d 753, 761 (1st Dist. 2004). See, also, *Cincinnati Ins. Co. v. Am. Hardware Mfrs. Ass'n*, 387 Ill.App.3d 85, 100, 898 N.E.2d 216, 229-230 (1st Dist. 2008).

Tymes never possessed a valid account receivable it could enforce against Asher as a result of the void status of its contracts. Its assignments of the receivables to PMT/Imperial are void because it never "ha[d] either actually or potentially" any rights to assign. *Cincinnati Ins.*, 387 Ill.App.3d 85, 100, 898 N.E.2d at 229-230. The same outcome applies to PMT/Imperial's assignments of the rights to Chase and voids any of Chase's efforts to charge Asher. Chase cannot assume a contractual right to collect from Asher that which was never validly created. When Chase held Asher liable for the void Tymes transactions, knowing their void nature, it violated its contract with Asher and Illinois law.

(2) Third Party Beneficiary Liability

If a contract is entered into for the direct benefit of a third person, he may sue for breach of the contract, even if he is a stranger to the contract and the consideration. *Olson v. Etheridge,* 177 Ill.2d 396, 404, 686 N.E.2d 563, 566 (Ill. 1997). The test is whether the benefit to the third person is direct to him or is it simply incidental to him; whether there is a direct benefit is determined from the intent of the contracting parties, as gleaned from the contract and all of the surrounding circumstances. *Metro East San. Dist. v. Village of Sauget*, 131 Ill.App.3d 653, 657, 475 N.E.2d 1327, 1330 (5th Dist. 1985). There is a strong presumption that the parties contracted strictly for themselves. *Id.* at 658, 475 N.E.2d at 1330. "The contract need not specifically name a third party beneficiary if it adequately defines a class of individual beneficiaries." *Weil, Freiburg,*

& Thomas v. Sara Lee Corp., 218 Ill.App.3d 383, 393, 577 N.E.2d 1344, 1352 (1st Dist. 1991).

"A third party is a direct beneficiary when the contracting parties have manifested an intent to confer a benefit on the third party. Whether a party is a third person beneficiary is determined on a case-by-case basis." *F.H. Paschen/S.N. Nielson v. Burnham*, 372 Ill.App.3d 89, 96, 865 N.E.2d 228, 235 (1st Dist. 2007) (citations omitted). The direct benefit need not have been the sole purpose of the contract but it must be clear that the contracting parties intended the third party to benefit directly. *Old Republic Ins. Co. v. Sidley & Austin*, 702 F.Supp. 207, 210 (N.D. Ill. 1988).

Chase never produced copies of its contract with VISA, though Asher requested it in written discovery. Despite three motions to compel, Chase never produced it.

Chase did, however, produce some of the By-Laws after it filed its first motion for summary judgment. The By-Laws required Chase to confirm it is entering a direct contractual relationship with Asher. Pet.App. H. The By-Laws manifest an intent to protect cardholders. In the event of fraud or a failure of consideration, the By-Laws allowed Chase to chargeback PMT/Imperial rather than charge Asher. Cardholders like Asher are sheltered from liability in cases of fraud or deficient consideration.[9] The merchant is liable when the cardholder does not sign the transaction receipt.

[9] Chase has not explained why it did not exercise its right to chargeback PMT/Imperial.

When Chase charged Asher for the Tymes transactions, in the absence of signed transaction receipts, it breached its obligations under the By-Laws. These provisions clearly are intended to protect Asher from fraudulent charges made with his credit card. Chase's breach of the By-Laws created Asher's breach of contract action.

The Seventh Circuit again validates Chase's refusal to produce documents in discovery. Chase refused to produce its contracts with VISA despite Asher's request. Chase moves for summary judgment, arguing Asher has not produced sufficient evidence of his third party beneficiary status. The district court and court of appeals both hold Asher responsible for Chase's violation of discovery rules and dismiss his claim at summary judgment.

Instead, both courts should have precluded Chase from denying its contract obligations under the By-Laws. Asher sought and was granted three court orders compelling Chase to produce its contract with VISA. "If a party...fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders." Fed. R. Civ. P. 37(b)(2). It would have been appropriate to take Asher's third party beneficiary status as established for purposes of the matter or to prohibit Chase from opposing Asher's claim of a third party beneficiary status. Fed. R. Civ. P. 37(b)(2)(i) and (ii). Dismissing Asher's contract claim in the face of Chase's discovery violations endorses the wrong behavior.

The Seventh Circuit specifically recognized "the district court did not address this theory of purported liability." Pet.App. Ex. C. Yet, the Seventh Circuit felt it was an appropriate venue to determine Asher's third party beneficiary status. The court of appeals is not the proper forum for this determination. There was no determination by a trier of fact concerning Asher's status under the By-Laws. Moreover, the district court never construed Asher's rights under the By-Laws. The Seventh Circuit was the first tribunal to discuss and rule on the issue. As a court of appeals, this was erroneous.

CONCLUSION

Wherefore, Asher requests this Court issue a writ of certiorari to the Seventh Circuit Court of Appeals.

Respectfully Submitted,

s/ John N. Dore
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JUNE 9, 2009

APPENDIX

Supreme Court, U.S.
FILED
081532 JUN 9 - 2009
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Donald Asher,
Petitioner

v.

Chase Bank USA, N.A.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALSFOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION

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JUNE 9, 2009

APPENDIX

Exhibit A – *Asher v. Bank One*, 538 F. Supp. 2d 1037 (N.D. Ill. 2008)

Exhibit B – *Asher v. Bank One*, 553 F. Supp. 2d 965 (N.D. Ill. 2008)

Exhibit C – *Asher v. Chase Bank USA, N.A.*, 2009 U.S. App. LEXIS 3733 (7th Cir. 2009)

Exhibit D – Northern District's Order Denying Chase's Motion for Reconsideration

Exhibit E – Seventh Circuit's Order Denying Asher's Petition for Rehearing

Exhibit F – Relevant Statutory Provisions

Exhibit G – Relevant Provisions of the Federal Reserve Board's Truth in Lending Official Staff Commentary to Regulation Z

Exhibit H – Relevant Provisions of the VISA By-laws and Operating Regulations

Exhibit A

Asher v. Bank One,
538 F. Supp. 2d 1037
(N.D. Ill. 2008)

DONALD ASHER, Plaintiff,
v.
BANK ONE and CAROL MACKENZIE,
Defendants.
No. 05 C 6225
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
538 F. Supp. 2d 1037
February 7, 2008, Decided
February 7, 2008, Filed

COUNSEL: For Donald Asher, Plaintiff: John N. Dore, LEAD ATTORNEY, Chicago, IL.
For Bank One, Defendant: Dabeer M. Roshanali, LEAD ATTORNEY, JPMorgan Chase, Chicago, IL; Rosa Maria Tumialan-Landy, Dykema Gossett Rooks Pitts PLLC, Chicago, IL.
Carol Mackenzie, Defendant, Pro se, Lynwood, IL.
For Carol Mackenzie, Defendant: Phillip J. Bartolementi, LEAD ATTORNEY, Attorney at Law, Chicago, IL.

JUDGES: Elaine E. Bucklo, United States District Judge.

OPINION BY: Elaine E. Bucklo
OPINION

MEMORANDUM OPINION AND ORDER

Plaintiff Donald Asher has filed a complaint against defendants Bank One Chase

Bank USA, N.A. ("Chase") and Carol MacKenzie. Defendant Chase has moved for summary judgment on plaintiff's claim under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1643. For the following reasons, the motion is granted.

I.

During the relevant time period in 2001-2004, Asher had a personal credit card account with Chase. At the time, Asher operated a family business in Chicago, in which he managed investments. He had employed defendant MacKenzie as a secretary since 1982. MacKenzie's responsibilities specifically included reviewing Asher's personal and business bills, including the Chase credit card. MacKenzie was tasked with checking the line item charges on the Chase credit card statements against receipts from the previous month, and crossing out line item charges which had a corresponding receipt. MacKenzie would then attach the receipts to the statements for Asher to review and authorize payment. Asher also gave MacKenzie his credit card information in writing in case it was needed in an emergency.

In May 1999, MacKenzie began operating her own sign business called "A Sign of the Tymes." As part of her business practice, MacKenzie would take customers' credit card numbers over the phone when an order was placed. Beginning in February 2001, MacKenzie began using Asher's Chase credit card information to incur charges for her business. No receipts were ever generated. Asher contends MacKenzie

improperly charged $ 77,655 on his card from February 2001 through March 2004.

During this time period, Asher continued to receive credit card statements from Chase. These reflected the charges MacKenzie had placed from her business. Although there were no receipts, MacKenzie would cross out her charges on the statement. Asher never questioned MacKenzie about the "A Sign of the Tymes" charges. Between February 2001 and March 2004, Asher authorized the preparation of checks -- signed by him, his brother and business partner, or wife -- for the amounts due as reflected in the credit card statements.

In March 2004, Asher learned of the "A Sign of the Tymes" charges while traveling abroad. Asher cannot recall whether his credit card had been declined or how he had been informed of the unfamiliar charges, but he contacted Chase over the telephone and informed it of the situation. That same month, Asher began his own investigation of the charges with the assistance of his cousin, who was an attorney. His investigation led him to discover that the charges dated back to 2001 and were processed by MacKenzie. MacKenzie was fired from her position as Asher's assistant and later pled guilty to criminal charges related to her personal business charges. Meanwhile, Asher requested Chase credit the amount of the charges processed for MacKenzie's business dating back to 2001. Chase conducted some type of investigation into Asher's claim and concluded the disputed charges were not the result of unauthorized use of the

credit card and refused to credit the charges. This lawsuit ensued. Plaintiff filed his complaint on or about September 19, 2005.

In his complaint, plaintiff seeks relief against Chase under 15 U.S.C. § 1643, which limits a cardholder's liability for the unauthorized use of the credit card to $ 50 (count I), and for breach of the credit card agreements (count II). Count III of the complaint is directed solely toward MacKenzie, who has not filed for summary judgment.

II.

Summary judgment is appropriate where the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Boumehdi v. Plastag Holdings, LLC,* 489 F.3d 781, 787 (7th Cir. 2007); FED. R. CIV. P. 56(c). I must construe all facts in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

III.

Chase moves for summary judgment on plaintiff's TILA claim on the ground that it is time-barred. Under the terms of the statute, 15 U.S.C. § 1643 is subject to a one-year statute of limitations. 15 U.S.C. § 1640(e); *Durham v. Loan Store, Inc.,* No. 04 C 6627, 2006 U.S. Dist. LEXIS 86031, 2006 WL 3422183, at *4 (N.D. Ill. Nov. 27, 2006) (Coar, J.) ("[A]ll TILA actions, unless

otherwise noted, must be brought within one year from the date the violation occurred."). Plaintiff, who filed his complaint more than one year after the March 2004 notification of the charges at issue, attempts to avoid summary judgment on the ground that defendant has not established when plaintiff became contractually obligated to pay the charges.

Plaintiff's argument lacks merit. Under the terms of 15 U.S.C. § 1643, "[a] cardholder shall be liable for the unauthorized use of a credit card [so long as the liability is not in excess of $ 50]" when certain conditions are met. Section 1602(o) defines the term "unauthorized use" as "a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit." Plaintiff's argument that no contractual obligation exists between plaintiff and defendant (or anyone else) because the underlying charges were fraudulent, and therefore the statute of limitations did not begin to run at the time of the alleged unauthorized uses in question, is inconsistent with the language of the statute. First, the language of § 1643 presupposes some type of contractual relationship between the cardholder and the card issuer. Otherwise, this section would be rendered a nullity for a cardholder would never be "liable" and would never have to seek redress under the statute. In other words, if, as Asher contends, he is not bound to pay the amounts at issue, then he need not resort to the protections afforded under § 1643. Second,

plaintiff seeks to recover from Chase for a breach of the cardholder agreement and submits, in its opposition to the motion for summary judgment, the VISA USA, Inc. (VISA) corporate by-laws and regulations which provide that "[t]o issue Cards means to enter into direct contractual relationships as the principal party with holders of Cards." (Pl. Resp. Br. at Exh. O at 4.) The complaint itself alleges the existence of a contractual relationship between the parties. (Compl. at p. 4 P 16.) In sum, plaintiff's argument that the statute of limitations has not run based on the alleged unauthorized nature of transactions is not supported by the language of the statute or the record in this case. Here, plaintiff began incurring the alleged unauthorized charges on his card as early as February 2001 and through March 2004. He does not dispute that he was sent credit card statements from Chase during this time period which reflected the alleged unauthorized charges. He claims he was unable to properly view the charges because of MacKenzie's wrongdoing, but nonetheless made payments to Chase for the charges at issue throughout that period. To the extent that the statute of limitations did not begin to run at the time of the transactions, plaintiff plainly admits that he discovered the charges in March 2004. This is still more than one year prior to the filing of the complaint. This exceeds TILA's statute of limitations.

Moreover, plaintiff's convoluted argument for tolling the statute of limitations in light of 15 U.S.C. § 1666 and its enacting regulation also

fails. First, this argument has no relevance for purposes of plaintiff's § 1643 claim in count I, as § 1666 sets forth a different cause of action. Regulation Z, the enacting regulation, requires a creditor to "comply with the appropriate resolution procedures...within 2 complete billing cycles (but in no event later than 90 days) after receiving a billing error notice." 12 C.F.R. § 226.13(c)(2). Second, plaintiff's complaint is devoid of allegations which would state a claim against Chase under § 1666. A party may not "amend his complaint through arguments in his brief in opposition to a motion for summary judgment." *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 606 (7th Cir. 2000) (quotation omitted). Specifically, the complaint fails to reference § 1666 and does not plead that plaintiff complied with the regulation's notice requirements. Regulation Z defines a "billing error notice" as "a written notice from a consumer . . . received by a creditor . . . no later than 60 days after the creditor transmitted the first periodic statement that reflects the alleged billing error." 12 C.F.R. § 226.13(b)(1); *see also Greisz v. Household Bank*, 8 F. Supp. 2d 1031, 1042 (N.D. Ill. 1998) ("[A] creditor's duty to investigate and to resolve an alleged billing error is triggered only when the consumer provides proper written notice to the creditor within 60 days of the creditor's transmission of the first allegedly erroneous billing statement."). Here, the only written notices proffered by Asher in opposition to the motion for summary judgment (which are not referenced or attached to the complaint) are

outside the requisite 60 day period. (*See* Pl. Resp. at Ex. N.) Finally, even if properly pled, defendant would still be entitled to summary judgment on this claim for the same reasons. Specifically, there is no evidence in the record that contradicts defendant's contention that plaintiff failed to comply with the notice requirements of § 1666.

Accordingly, plaintiff's TILA claim is time-barred and defendant is entitled to summary judgment.[1]

1. To the extent plaintiff seeks relief for breach of contract in count II, defendant's TILA statute of limitations arguments do not apply and plaintiff is not entitled to summary judgment. Although defendant alludes to plaintiff's breach of contract claim (Def. Rply. at 7), neither of the parties briefed this issue.

IV.

For the foregoing reasons, defendant Chase's motion for summary judgment on plaintiff's TILA claim is granted.

/s/ Elaine E. Bucklo
Elaine E. Bucklo
United States District Judge
Dated: February 7, 2008

Exhibit B

Asher v. Bank One
553 F. Supp. 2d 965
(N.D. Ill. 2008)

DONALD ASHER, Plaintiff,
v.
BANK ONE and CAROL MACKENZIE,
Defendants.
No. 05 C 6225
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION
553 F. Supp. 2d 965
April 28, 2008, Decided
April 28, 2008, Filed

COUNSEL: For Donald Asher, Plaintiff: John N. Dore, LEAD ATTORNEY, Chicago, IL.
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Carol Mackenzie, Defendant, Pro se, Lynwood, IL.
For Carol Mackenzie, Defendant: Phillip J. Bartolementi, LEAD ATTORNEY, Attorney at Law, Chicago, IL.
JUDGES: Elaine E. Bucklo, United States District Judge.

OPINION BY: Elaine E. Bucklo

MEMORANDUM OPINION AND ORDER

Plaintiff Donald Asher has filed a complaint against defendants Bank One Chase Bank USA, N.A. ("Chase") and Carol MacKenzie.

Defendant Chase has moved for summary judgment on plaintiff's claim under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1643, which I granted. The parties have now filed cross motions for summary judgment on plaintiff's breach of contract claim. For the following reasons, defendant's motion is granted.

I.

Chase moves for summary judgment on plaintiff's breach of contract claim on the grounds that it did not owe plaintiff any of the duties alleged in the complaint and because MacKenzie had apparent authority to incur the charges at issue.[1] With respect to the first ground, the complaint alleges that

> [Chase] owed Plaintiff a duty to determine that the credit card application for payments and the charges thereon were signed and authorized by the Plaintiff. [Chase] owed the Plaintiff a duty, either personally or through its agents and representatives, to examine each charge and application for credit purchase to determine if the signature thereon was authentic and in accord with the authority set forth in the credit card agreements.

(Compl. at PP 14-15.) Plaintiff concedes it has failed to provide copies of any agreement or other record to support the alleged contract. In the absence of any evidence of the terms of the allegedly breached agreements, plaintiff cannot prove breach of a contract. Accordingly, I need not decide the issue of apparent authority.

1 The statement of the facts and summary judgment standard are incorporated from this court's previous Memorandum Opinion and Order.

II.

For the foregoing reasons, defendant's motion for summary judgment is granted and plaintiff's motion for summary judgement is denied.

/s/ Elaine E. Bucklo
Elaine E. Bucklo
United States District Judge
Dated: April 28, 2008

Exhibit C

Asher v. Chase Bank USA, N.A.,
2009 U.S. App. LEXIS 3733
2009 WL 465083
(7th Cir. 2009)

DONALD ASHER, Plaintiff-Appellant,
v.
CHASE BANK USA, N.A., Defendant-Appellee.
No. 08-2217
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
2009 U.S. App. LEXIS 3733
2009 WL 465083
December 16, 2008, Argued
February 20, 2009, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY:
Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 05 C 6225. Elaine E. Bucklo, Judge.
Asher v. Bank One, 553 F. Supp. 2d 965 (N.D. Ill., 2008)
Asher v. Bank One, 538 F. Supp. 2d 1037 (N.D. Ill., 2008)

COUNSEL: For DONALD ASHER, Plaintiff - Appellant: John N. Dore, Attorney, JOHN N. DORE & ASSOCIATES, Chicago, IL.
For CHASE BANK USA, N.A., Defendant - Appellee: Rosa M. Tumialan, Attorney, DYKEMA, Chicago, IL;Dabeer M. Roshanali, Attorney, BANK ONE, Law Department, Chicago, IL.

JUDGES: Before TERENCE T. EVANS, Circuit Judge, ANN CLAIRE WILLIAMS, Circuit Judge, DIANE S. SYKES, Circuit Judge.

OPINION
ORDER

Donald Asher's personal secretary used her position to incur and conceal fraudulent charges on Asher's credit card over the course of three years during which Asher paid his bills in full. When he discovered the fraud and asked for reimbursement from Chase Bank, which issued the credit card, Chase eventually refused after a lengthy investigation. Asher sued Chase approximately eighteen months after discovering the fraud and eight months after receiving final notice that Chase would not reimburse him. Asher claimed that the bank's refusal to repay him violated the Truth in Lending Act and, as the district court understood his complaint, constituted a breach of his cardholder agreement with Chase. The district court granted summary judgment for Chase, reasoning that the federal statutory claim was barred by the relevant statute of limitations and the state-law contract claim lacked evidentiary support. Asher appeals. Although the district court's statute-of-limitations analysis is questionable, we affirm the judgment because a jury could not reasonably find for Asher on either his federal or his state claim.

I. Background

For over twenty years, Asher employed Carol MacKenzie as a secretary for his family and

the family business. He gave her the responsibility of preparing his credit-card statements for his review, including the statements for a VISA card issued by Chase (the card initially was issued by another bank and through a succession of ownership changes, was reissued by Bank One and then by Chase). If McKenzie possessed receipts for individual charges appearing on the statements, she was to attach them and draw a line through the corresponding entry on the statement so that Asher could focus his review on those charges MacKenzie had not substantiated. When she presented the statements to Asher, MacKenzie also prepared a check in the amount of the bill for Asher to sign or, more frequently, for his mother or brother to sign on his behalf. MacKenzie abused her position by using the Chase VISA account number to incur fraudulent charges and then crossing out those entries on the corresponding statements in hopes that Asher would not notice them. Specifically, MacKenzie had opened a sign-making business, A Sign of the Tymes, which she was running out of her house. She had entered into a merchant agreement with PMT/Imperial Bank that allowed her to accept credit cards in payment for her signs, and in 2001 she began posting fictitious charges from Tymes to Asher's card as though he was buying signs from her company. She did not create receipts for these transactions, but Asher did not question her about them. Asher paid his bills in full and did not discover the charges until 2004, by which time MacKenzie had collected $ 77,655. The most

recent charges were incurred just days before Asher discovered the fraud.

Asher got wind of MacKenzie's fraud in March 2004 when Chase (at that time the card issuer was still Bank One, but for simplicity we use "Chase" throughout) notified him about "excessive charges" on his account. Asher then reviewed his prior statements and discovered the Tymes charges going back to 2001. He notified Chase about the fraudulent charges, and by letter dated March 8, 2004, Chase acknowledged his fraud claim. Asher fired MacKenzie on March 23.

The following month Chase notified Asher that it would not reimburse him because after investigating his fraud claim, the bank had concluded that he was liable for the Tymes charges. But when Asher protested, Chase continued to evaluate his claim and on September 15, 2004, requested that he provide another affidavit of fraud. Finally, in a letter dated October 15, 2004, but apparently postmarked January 28, 2005, Chase gave final notice that it considered Asher liable for the Tymes charges. Chase had previously credited Asher's account $ 16,785 as partial reimbursement for the Tymes charges, so it rebilled those transactions on his statement for the period ending in February 2005, for which payment was due on March 14, 2005.

In September 2005 Asher filed suit in state court against Chase and MacKenzie, and the following month the bank removed the action to federal court. MacKenzie later pleaded guilty to state theft charges and was dropped from the lawsuit. In Count I of his complaint, Asher

claimed that by refusing to reimburse him, Chase had violated the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f, which provides in relevant part that "a cardholder incurs no liability from the unauthorized use of a credit card" beyond at most $ 50. *Id.* § 1643. In Count II of his complaint, Asher alleged that Chase had "contracted and agreed with Plaintiff that it would only pay and allow payments on charges and applications for reimbursement in accord with the authority set forth in the credit card agreements." He claimed that the bank had "breached its duty to the Plaintiff" by allowing his VISA account to be charged for forged applications for payment, and by failing "to determine the authority by which fraudulent charges and applications for payments were allowed to be made."

In October 2007 Chase moved for summary judgment. The bank, however, ignored Count II of Asher's complaint and addressed its motion solely to his TILA claim. As to that claim, Chase first asserted that it was untimely under 15 U.S.C. § 1640(e), which provides that a civil action alleging a violation of TILA must be brought "within one year from the date of the occurrence of the violation." The "occurrence of the violation," Chase argued, is the date on which a card issuer "consummates" an allegedly unauthorized charge by posting it to the cardholder's account. It follows, Chase reasoned, that Asher's claim was too late because all of the Tymes charges were processed more than a year before he filed suit. Alternatively, Chase argued that Asher's claim

would fail on the merits because according to the bank, the charges made by MacKenzie were not "unauthorized." For purposes of § 1643, TILA defines "unauthorized use" of a credit card as use "by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit." 15 U.S.C. § 1602(o). The use of Asher's account by MacKenzie, the bank asserted, was not "unauthorized" because Asher's repeated payments of her transactions evidenced her apparent authority to charge purchases to the account.

The district court agreed with Chase's statute-of-limitations argument and did not discuss the merits. The court reasoned, without citing authority, that the limitations period for the § 1643 claim began to run at the time of the transactions or, at the latest, when Asher discovered the fraudulent Tymes charges in March 2004. Either way, the court continued, Asher's claim under TILA was untimely because he did not file suit until September 2005. In reaching this conclusion, the court apparently overlooked Asher's contention that his claim under § 1643 did not even accrue until early 2005 when Chase definitively rejected his claim for reimbursement. And although its reasoning is difficult to discern, the court also rejected Asher's contention that principles of equitable tolling or equitable estoppel rendered his TILA claim timely.

As for Count II of the complaint, however, the district court noted that Chase had said

nothing about it in its motion for summary judgment. Chase then moved for summary judgment on Count II, which it characterized as a claim for breach of the cardholder agreement between Chase and Asher. Asher asked for and received more time to respond, but he did not assert by affidavit, *see* FED. R. CIV. P. 56(f), that he needed additional discovery. He then responded to Chase's motion and filed his own cross-motion for summary judgment, arguing in both submissions that Chase had breached not only the cardholder agreement (which according to Asher the bank had refused to produce) but also agreements between VISA and the bank that, in Asher's view, gave him rights as a third-party beneficiary. The district court once again granted summary judgment for Chase, explaining that Asher could not prove a breach of contract because he "concedes" that he "failed to provide copies of any agreement or other record to support the alleged contract." The court did not specifically mention Asher's theory that he was a third-party beneficiary of agreements between VISA and Chase.

II. Discussion

A. TILA Statute of Limitations

Asher argues that the district court improperly granted summary judgment on his TILA claim because, he contends, the court erred in determining when the claim accrued and should have applied tolling doctrines. The district court proposed two possible accrual dates--the

time of the transactions or when Asher discovered them--but concluded that both were outside the limitations period. The court also rejected Asher's tolling theories.

Although the Truth in Lending Act does not state explicitly that a cardholder can bring a suit claiming a violation of 15 U.S.C. § 1643, the majority of other circuit and district courts faced with such a claim have assumed, on similar facts, the existence of a cardholder claim under § 1643. *See DBI Architects, P.C. v. Am. Express Travel-Related Servs. Co.*, 363 U.S. App. D.C. 365, 388 F. 3d 886, 892-93 (D.C. Cir. 2004) (implicitly recognizing § 1643 claim by cardholder); *Minskoff v. Am. Express Travel Related Servs. Co.*, 98 F.3d 703, 708-10 (2d Cir. 1996) (same); *Draiman v. Am. Express Travel Related Servs. Co.*, 892 F. Supp. 1096, 1098-1100 (N.D. Ill. 1995) (same); *see also Permobil, Inc. v. Am. Express Travel Related Servs. Co.*, 571 F. Supp. 2d 825, 830-36 (M.D. Tenn. 2008); *Carrier v. Citibank (S.D.) N.A.*, 383 F. Supp. 2d 334, 338-41 (D. Conn. 2005), *aff'd*, 180 Fed.App'x 296 (2d Cir. 2006). *But see Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 174-75 (3d Cir. 2008) (concluding, without discussing other authority, that card issuer's claim of indemnification against merchant and acquirer failed because § 1643 does not impose duty on card issuer to reimburse cardholder for unauthorized charges). Like Chase and the majority of these courts, we also assume that a cardholder can bring a claim under § 1643. And like all TILA claims, a claim under § 1643 is subject to a one-year statute of limitations. *See* 15

U.S.C. § 1640(e) ("Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."); *Draiman,* 892 F. Supp. at 1098 (applying one-year limitations period to § 1643 claim).

Unless Congress has provided otherwise, a claim arising under federal law accrues when the plaintiff has discovered or reasonably should have discovered the injury. *In re Copper Antitrust Lit.,* 436 F.3d 782, 789 (7th Cir. 2006); *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 450 (7th Cir. 1990). In his brief in this court, Asher contends that he discovered his injury in March 2004 when he first learned of the fraudulent charges, but as the district court noted, that was still more than a year before he filed suit in September 2005. Asher had argued in opposing summary judgment that his claim under § 1643 accrued in March *2005* when the fraudulent charges that Chase rebilled to his account became due, which was six months before he filed suit. But Chase has taken him at his word that he now intends 2004, and he did not assert in his reply brief or at argument that he made a mistake.

Asher then seems to concede that his TILA claim accrued in March 2004 when he discovered MacKenzie's fraud, and for the moment we also will assume that the statute of limitations started to run at that point. Because Asher did not file suit until more than a year later, though, he is left to argue that the statute of limitations was tolled, [1], either by equitable tolling or equitable estoppel

(he conflates the two doctrines), until Chase told him once and for all that it would not reimburse him for the fraudulent charges. Asher contends that Chase deceived him by saying it was investigating his claim when in fact it was not. There is no evidence, says Asher, that Chase actually undertook an investigation complying with 12 C.F.R. § 226.13(e), a regulation concerning billing errors by creditors that is one of a group of regulations (known collectively as "Regulation Z") issued by the Federal Reserve Board in carrying out its mandate to enforce TILA. *See* 12 C.F.R. § 226.1-.36. It follows, says Asher, that a genuine issue of material fact still remains concerning whether the limitations period was tolled. MacKenzie's final fraudulent transaction was made only a few days before Asher discovered her scheme, so regardless which accrual date is correct, some portion of Asher's claim under § 1643 would be timely if, as he contends, the limitations period was tolled while Chase was purportedly investigating.

1 Our opinion in *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1166-67 (7th Cir. 1997), suggests agreement with several circuits that § 1640(e) does not limit a district court's jurisdiction to entertain claims brought outside the limitations period and thus equitable tolling is available. *E.g., Ellis v. GMAC*, 160 F.3d 703 (11th Cir. 1998); *Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499 (3d Cir. 1998); *King v. California*, 784 F.2d 910 (9th Cir. 1986); *Jones v. TransOhio Sav. Ass'n*, 747 F.2d 1037 (6th Cir. 1984). The

parties do not argue to the contrary, and in *Lawyers Title* we declined to follow the one case that disagrees, *Hardin v. City Title & Escrow Co.*, 254 U.S. App. D.C. 370, 797 F.2d 1037, 1039-40 & n.4 (D.C. Cir. 1986).

Asher's discussion of tolling, both in the district court and here, is convoluted, and it is understandable if the district court had trouble following his reasoning. Equitable estoppel, a subset of which is fraudulent concealment, applies when the plaintiff shows that the defendant misled him or took active steps to prevent him from filing suit before the statutory period expired. *Smith v. Potter*, 445 F.3d 1000, 1010 (7th Cir. 2006); *In re Copper Antitrust Lit.*, 436 F.3d at 790-91; *Cada*, 920 F.2d at 450-51. Equitable tolling, by contrast, applies when the plaintiff, though diligent, could not have obtained the information necessary to file a claim before the end of the limitations period. *Lewis v. City of Chicago*, 528 F.3d 488, 493 (7th Cir. 2008); *Cada*, 920 F.2d at 451. The latter doctrine does not require fault on the part of the defendant, but it is used sparingly and only when the plaintiff shows extraordinary circumstances. *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 964 (7th Cir. 2005); *Modrowski v. Mote*, 322 F.3d 965, 967 (7th Cir. 2003). The plaintiff bears the burden of proving his entitlement to either doctrine. *See Hamilton v. Komatsu Dresser Indus., Inc.*, 964 F.2d 600, 606 (7th Cir. 1992); *Stark v. Dynascan Corp.*, 902 F.2d 549, 551 (7th Cir. 1990).

Neither doctrine quite fits here. With regard to equitable estoppel, Asher has the

burden backwards: At summary judgment Chase had no obligation to establish the propriety of its investigation of Asher's fraud claim. Asher did not produce concrete evidence that Chase had misled him or actively sought to prevent him from suing in time. Asher has a better argument for equitable tolling, but it is still a rough fit. Equitable tolling usually demands "extraordinary circumstances," and here the lengthy period it took Chase to resolve a $77,655 claim of three years' worth of fraudulent charges does not seem altogether extraordinary. Besides, the ongoing investigation did not prevent Asher from going ahead with his lawsuit even before he received a definitive answer from Chase.

But was he required to do that? A rule that would compel the cardholder to sue while the card issuer is still investigating a claim could lead to wasteful litigation; had Chase resolved Asher's claim in his favor, there would have been no reason to sue. Chase, after all, did not defraud Asher, MacKenzie did, and it is difficult to see how Chase wronged Asher by investigating whether the disputed charges were in fact unauthorized. Chase has taken the position that a card issuer violates § 1643 when it posts allegedly unauthorized charges. Logically, though, it would seem that the card issuer violates § 1643 not when it initially posts a transaction that it has no reason to believe is unauthorized, but instead when it rejects the cardholder's fraud claim and insists that the cardholder is liable. Asher comes close to realizing this point when he asserts, albeit in his

discussion of tolling rather than accrual, that "Chase made a conclusive decision in January, 2005--effective in February, 2005--that caused the accrual of the time for prosecuting a claim under TILA."

We have not found a published appellate decision, in this or any circuit, that addresses when a claim under § 1643 accrues. Section 1643 limits a cardholder's liability for "unauthorized use" of the cardholder's credit card. Unauthorized use is defined as use "by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit." 15 U.S.C. § 1602(o). The TILA statute of limitations begins to run when a "violation" of TILA occurs, *see* 15 U.S.C. § 1640(e), but neither § 1640 nor § 1643 identify which date that is or what action constitutes the "violation" of § 1643. *Cf. Nash v. First Fin. Sav. & Loan Ass'n*, 703 F.2d 233, 237-39 (7th Cir. 1983) (analyzing when "violation" occurred under another provision of TILA to determine when statute accrued).

Neither Asher, nor Chase, nor the district court has articulated a persuasive theory about when a violation of § 1643 occurs. Asher, who does not maintain a consistent position about the date of accrual, goes so far as to suggest that the statute of limitations *never* began to run because the charges were fraudulent and so he was never contractually obligated to pay them. As the district court observed, if this reading was correct, then § 1643 would be superfluous: Cardholders would not need the protections provided in § 1643

because they would never be obligated to pay unauthorized charges. Chase barely addresses the question of accrual in its brief here, but asserts in a footnote that a violation occurs on the date the credit transaction "is consummated and the consumer becomes contractually obligated." Chase does not elaborate on this sentence and as authority cites only an unpublished decision from the Northern District of Illinois, *see Durham v. Loan Store, Inc.*, No. 04 C 6627, 2006 U.S. Dist. LEXIS 86031, 2006 WL 3422183, at *4 (N.D. Ill. Nov. 27, 2006) (unpublished), and the Regulation Z definition of "consummation," *see* 12 C.F.R. § 226.2(a)(13). The district court suggested that violations of § 1643 occur "at the time of the transactions" or perhaps when the cardholder discovers them.

This existing case law is unpersuasive because a conclusion that § 1643 is violated when a sale transaction is "consummated" is inconsistent with TILA's statutory scheme, the Federal Reserve Board's interpretation of its Regulation Z, and the text of § 1643. The Sixth Circuit, in an unpublished and nonprecedential decision, and the Northern District of Illinois have both concluded, without much explanation, that a violation of § 1643 occurs when the unauthorized charge is made or posted. *Borg v. Chase Manhattan Bank USA*, 247 Fed. App'x 627, 635 (6th Cir. 2007) (unpublished); *Draiman*, 892 F. Supp. at 1098. The case Chase cites for the proposition that a violation occurs when the transaction is consummated does not involve an action under § 1643 but rather the disclosures

required for a mortgage loan. *Durham,* 2006 U.S. Dist.LEXIS 86031, 2006 WL 3422183. *Durham* states that "[a] violation occurs when the credit transaction is consummated" and concludes that the transaction was consummated at the plaintiff's first closing on the loan. 2006 U.S. Dist. LEXIS 86031, at *4. The *Durham* court did not provide a citation for this proposition, perhaps because it is so well established in the context of loan contracts. *See Nash,* 703 F.2d at 238. Tracing it back
through the caselaw, however, the proposition stems from a provision in Regulation Z, Subpart C, on "closed-ended credit," and within the section addressing when a creditor must make disclosures required by TILA: "The creditor shall make disclosures before consummation of the transaction." 12 C.F.R. § 226.17(b).

But a creditor does not violate § 1643 by failing to make required disclosures, so a provision governing
when they must be made is inapplicable. Indeed, the Federal Reserve Board specifically provides in its commentary to the definition of "consummation," 12 C.F.R. § 226.2(a)(13), that the term does not apply to "sales": "[C]onsummation does not occur when the consumer becomes contractually committed to a sale transaction, unless the consumer also becomes legally obligated to accept a particular credit arrangement." Federal Reserve Board Truth in Lending Official Staff
Commentary to Regulation Z, 12 C.F.R. pt. 226, Supp.

§ 226.2(a)(13), (2) (distinguishing consummation of credit versus sale transaction); *see Anderson Bros. Ford v. Valencia,* 452 U.S. 205, 219, 101 S. Ct. 2266, 68 L. Ed. 2d 783 (1981) (directing courts to defer to Board's regulations implementing TILA legislation and to its interpretation of those regulations). Moreover, § 1643 is within Subpart B of Regulation Z, which governs "open-ended credit," and has a separate set of rules from those in Subpart C governing "closed-ended credit" (and an entirely different disclosure provision, though neither disclosure provision applies here). *See* 12 C.F.R. § 226.12(b) (concerning "Special Credit Card Provisions" corresponding to the text of § 1643 and located within Subpart B of Regulation Z); *see also* 12 C.F.R. pt. 226, Table of Contents.

Finally, a conclusion that § 1643 is violated when the card is used or the transaction is posted is inconsistent with the text of § 1643. That section provides that a cardholder is liable for "unauthorized use" of the card only in specific circumstances. It seems a stretch to conclude that a card issuer violates the statute even before the cardholder has claimed that a particular use was unauthorized, much less before that claim has been investigated and rejected. It is more logical to conclude that a violation occurs when the card issuer notifies the cardholder that despite the cardholder's claim of fraud, the card issuer will not reimburse the cardholder for the disputed amount. Here, the violation occurred and the limitations period commenced when Chase notified Asher that it deemed him liable--for the

final time, in January 2005. Asher's suit in September 2005 therefore is not time-barred.

B. Merits of the TILA Claim

We can affirm the grant of summary judgment on any basis that Chase asserted previously, *see Wis. Cent., Ltd. v. Shannon,* 539 F. 3d 751, 761 (7th Cir. 2008), and in this court Chase reasserts its contention that MacKenzie possessed apparent authority to incur the Tymes charges. We agree, and for that reason the charges were not "unauthorized."

Chase argues that MacKenzie's charges to Asher's card, although fraudulent, were not "unauthorized" within the meaning of § 1643 and § 1602(o) because MacKenzie had apparent authority to use the account. *See DBI Architects,* 363 U.S. App. D.C. 365, 388 F.3d 886. Section 1602(o) defines "unauthorized use" as use "by a person other than the cardholder who does not have actual, implied, or apparent authority for such use." Courts have concluded that Congress intended agency law to govern whether use by someone other than the cardholder was authorized, *DBI Architects,* 388 F.3d at 890; *Towers World Airways Inc. v. PHH Aviation Sys. Inc.,* 933 F.2d 174, 176-77 (2d Cir. 1991), and in its commentary to Regulation Z, the Federal Reserve Board has made explicit that "whether authority exists must be determined under state or other applicable law," Federal Reserve Board Truth in Lending Official Staff Commentary to Regulation Z, 12 C.F.R. pt. 226, Supp. I § 226.12(b)(1). Illinois law and federal common law

are in accord with the *Restatement (Second) of Agency* on the issue of apparent authority. *Opp v. Wheaton Van Lines, Inc.*, 231 F.3d 1060, 1064 (7th Cir. 2000). Apparent authority arises when the principal's words or conduct
cause a third person to reasonably believe that the putative agent's conduct on the principal's behalf is authorized. *See Moriarty v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 866 & n.15 (7th Cir. 1998); *York v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 222 Ill. 2d 147, 854 N.E.2d 635, 655-60, 305 Ill. Dec. 43 (Ill. 2006); RESTATEMENT 2D OF AGENCY §§ 8, 27 (1958); *see also* RESTATEMENT 3D OF AGENCY § 2.03 (2006). The principal may not then deny the agent's authority to a third party who has relied upon it. *See Minskoff*, 98 F.3d at 708; *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873, 883-84 (7th Cir. 1992) (applying Illinois agency law); *York*, 854 N.E.2d at 655-60; *State Sec. Ins. Co. v. Burgos*, 145 Ill. 2d 423, 583 N.E.2d 547, 551, 164 Ill. Dec. 631 (Ill. 1991); RESTATEMENT 2D OF AGENCY §§ 8B, 8 cmt. d; *see also* RESTATEMENT 3D OF AGENCY § 2.03.

Chase explains that in *DBI Architects* the court held that the company clothed its employee with apparent authority to use its AMEX account, despite the fact that the employee added herself as a cardholder without the management's knowledge or approval, because for ten months the company paid without protest all of the employee's fraudulent charges after receiving statements that identified the employee as a cardholder and itemized her charges. 388 F.3d at

888, 893-94. The court declined to hold that the plaintiff created apparent authority in the employee solely by failing to review the account statements, *id.* at 891-93, as the Second Circuit had held in *Minskoff,* 98 F.3d 703, although this is a rather fine distinction. The court reasoned that the Federal Reserve Board's official staff interpretation of 12 C.F.R. § 226.12(b)(3) supports the conclusion that a consumer could still be entitled to protection under § 1643 even if the consumer did not exercise his right to protest an inaccurate billing statement under the Fair Credit Billing Act, *see* 15 U.S.C. § 1666, and that failing to contest charges would not create apparent authority. *DBI Architects,* 388 F.3d at 892-93. On the other hand, the court continued, the company's repeated payment of its employee's fraudulent charges led the card issuer to reasonably believe that she had the authority to make charges on the account. *Id.* at 893-94. The court concluded that this result would obtain under both D.C. agency law and the federal common law because they were the same. *Id.* at 890.

Asher offers no meaningful response to this argument; in his briefs he does not even discuss *DBI Architects.* The situation discussed in that decision, as well as in the case it draws support from, *Minskoff,* 98 F.3d 703, is similar to what happened here. Both of those decisions involved a corporate cardholder that over a period spanning many months paid its bills without protest even though those bills included charges made by an employee who did not have the company's

approval to use the account. *DBI Architects,* 388 F.3d at 888; *Minskoff,* 98 F.3d at 706-07. If anything, Chase has a stronger argument for apparent authority because in *DBI Architects* and *Minskoff the* employees who made the fraudulent charges were the same ones paying the bills on behalf of the cardholders, whereas in this case Asher or his brother or mother were at least signing off on the checks to Chase. Asher paid his bills in full, including the Tymes charges, for three years without protest. This scenario makes a compelling case for concluding that MacKenzie had apparent authority to make charges on Asher's account. And while in *DBI Architects* the court remanded for further proceedings concerning the point at which the employee's apparent authority arose, 388 F.3d at 894, Asher makes no argument that a similar determination is necessary in this case.

C. State-law Contract Claim

Finally, Asher contends that the district court improperly granted Chase's motion for summary judgment on his state-law contract claim and instead should have granted his cross-motion for summary judgment. The district court apparently understood Asher to be claiming only that Chase breached its cardholder agreement with Asher, and on that theory the court held that Chase was entitled to summary judgment because Asher had not even produced the cardholder agreement and thus could not point to any provision that was breached. The court's conclusion is unassailable to the extent that

Asher's contract theory concerns his cardholder agreement with Chase, and Asher does not even attempt to undermine the court's reasoning.

Instead, Asher focuses on his theory that he was a third-party beneficiary to contracts between Chase and VISA, and between Mackenzie and PMT/Imperial, her acquiring bank for credit-card transactions at A Sign of the Tymes. Those contracts were produced at summary judgment, but the district court did not address this theory of purported liability. As between Chase and VISA, Asher seems to argue that Chase was obligated by its agreement with VISA to determine whether there were signed receipts for the disputed charges, that Chase did not adequately investigate his claim of fraud, and that Chase should have charged the Tymes transactions back to PMT/Imperial. As far as MacKenzie's contract with PMT/Imperial, however, it is not clear how Asher thinks that he has rights under that contract.

Asher failed to produce any evidence at summary judgment that could establish he is a third-party beneficiary of any of these contracts. Asher sought to link himself to Chase's agreement with VISA by pointing in his statement of material facts to a provision defining the process of "issuing cards" to include entering "direct contractual relationships as the principal party with holders of cards." That provision does not suffice to show that the parties entered the VISA agreement for the benefit of individual cardholders, and it does not overcome the strong presumption in Illinois law (which the parties

agree applies here) against recognizing third-party beneficiaries. *See Estate of Willis v. Kiferbaum Constr. Corp.*, 357 Ill. App. 3d 1002, 830 N.E.2d 636, 643, 294 Ill. Dec. 224 (Ill. App. Ct. 2005). On this record, Asher's theory of contract liability is meritless.

Accordingly, we AFFIRM the grant of summary judgment for Chase on the TILA claim but on the alternate ground that MacKenzie's use of Asher's credit card was not "unauthorized" because she had apparent authority. We also AFFIRM the grant of summary judgment for Chase on Asher's state-law contract claim.

Exhibit D

Northern District's Order
Denying Chase's Motion for Reconsideration

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge Elaine E. Bucklo

Sitting Judge if Other than Assigned Judge

CASE NUMBER 05 C 6225

DATE 2/20/2008

CASE TITLE *Asher vs. Bank One, et al.*

DOCKET ENTRY TEXT

Defendant's motion for reconsideration is denied. While piecemeal motions for summary judgment are disfavored, if Chase believes it has a meritorious motion for summary judgment on count II of the complaint, it may bring such a motion, supported by memorandum and a Rule 56 statement, within 21 days. No extension will be allowed. Otherwise, trial is set for May 19, 2008. A pretrial order shall be filed by May 1, 2008. Final pretrial conference is set for May 7, 2008, at 4:00 p.m. O[For further details see text below.] Notices mailed by Judicial staff.

STATEMENT

Defendant Bank One Chase Bank USA, N.A., ("Chase") has moved for reconsideration of the February 7, 2008 Memorandum Opinion and Order granting its motion for summary judgment on plaintiff's Truth in Lending Act ("TILA") claim.

Chase seeks to have me grant summary judgment on plaintiff's remaining breach of contract claim in count II although it completely failed to raise or brief that issue in its motion and memorandum for summary judgment. In fact, its motion and memorandum for summary judgment fail to even reference the breach of contract claim. (*See* Doc. Entry # 50-51.) Any argument on this issue for purposes of the motion for summary judgment was therefore waived. *See Amerson v. Farrey*, 492 F.3d 848, 852 (7th Cir. 2007) ("Arguments raised for the first time in a reply brief are waived."); *DiChristofano v. Neiman Marcus Group, Inc.*, No. 07 C 2250, 2007 WL 3231424, at *5 (N.D. Ill. Oct. 30, 2007). The motion for reconsideration is therefore denied. While piecemeal motions for summary judgment are disfavored, if Chase believes it has a meritorious motion for summary judgment on count II of the complaint, it may bring such a motion, supported by memorandum and a Rule 56 statement, within 21 days. No extension will be allowed. Otherwise, trial is set for May 19, 2008. A pretrial order shall be filed by May 1, 2008. Final pretrial conference is set for May 7, 2008, at 4:00 p.m.

Exhibit E

Seventh Circuit's Order
Denying Asher's Petition for Rehearing

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 1, 2009

Before
TERRENCE T. EVANS, *Circuit Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 08-2217

Appeal from the United States Distict Court for the Northern District of Illinois, Eastern Division

DONALD ASHER,
Plaintiff-Appellant,

v.

No. 05 C 6225

CHASE BANK USA, N.A.,
Defendant-Appellee.

Elaine E. Bucklo
Judge.

ORDER

On March 20, 2009, both parties in this matter individually filed petitions for rehearing. All of the judges on the panel have voted to deny the parties' petitions. It is therefore ordered that the petitions for rehearing are **DENIED.**

Exhibit F

Relevant Statutory Provisions

15 U.S.C.A. § 1602 (o)
Definitions and rules of construction

The term 'unauthorized use,' as used in section 133 [15 USC § 1643], means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

15 U.S.C.A. § 1643
Liability of holder of credit card

(a) Limits on liability
(1) A cardholder shall be liable for the unauthorized use of a credit card only if—

(A) the card is an accepted credit card;

(B) the liability is not in excess of $50;

(C) the card issuer gives adequate notice to the cardholder of the potential liability;

(D) the card issuer has provided the cardholder with a description of a means by which the card issuer may be notified of loss or theft of the card, which description may be provided on the face or reverse side of the statement required by section 1637 (b) of this title or on a separate notice accompanying such statement;

(E) the unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred

or may occur as the result of loss, theft, or otherwise; and

(F) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it.

(2) For purposes of this section, a card issuer has been notified when such steps as may be reasonably required in the ordinary course of of business to provide the card issuer with the pertinent information have been taken, whether or not any particular officer, employee, or agent of the card issuer does in fact receive such information.

(b) Burden of proof

In any action by a card issuer to enforce liability for the use of a credit card, the burden of proof is upon the card issuer to show that the use was authorized or, if the use was unauthorized, then the burden of proof is upon the card issuer to show that the conditions of liability for the unauthorized use of a credit card, as set forth in subsection (a) of this section, have been met.

(c) Liability imposed by other laws or by agreement with issuer

Nothing in this section imposes liability upon a cardholder for the unauthorized use of a credit card in excess of his liability for such use under other applicable law or under any agreement with the card issuer.

(d) Exclusiveness of liability

Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

12 C.F.R. § 226.12
Special credit card provisions.

(a) *Issuance of credit cards.* Regardless of the purpose for which a credit card is to be used, including business, commercial, or agricultural use, no credit card shall be issued to any person except:
(1) In response to an oral or written request or application for the card; or

(2) As a renewal of, or substitute for, an accepted credit card.[21]
[21] For purposes of this section, *accepted credit card* means any credit card that a cardholder has requested or applied for and received, or has signed, used, or authorized another person to use to obtain credit. Any credit card issued as a renewal or substitute in accordance with this paragraph becomes an accepted credit card when received by the cardholder.

(b) *Liability of cardholder for unauthorized use—*
(1) *Limitation on amount.* The liability of a cardholder for unauthorized use[22] of a credit card shall not exceed the lesser of $50 or the amount of money, property, labor, or services obtained by the unauthorized use before notification to the card issuer under paragraph (b)(3) of this section.

[22] *Unauthorized use* means the use of a credit card by a person, other than the cardholder, who does not have actual, implied, or apparent authority for such use, and from which the cardholder receives no benefit.

(2) *Conditions of liability.* A cardholder shall be liable for unauthorized use of a credit card only if:

(i) The credit card is an accepted credit card;

(ii) The card issuer has provided adequate notice[23] of the cardholder's maximum potential liability and of means by which the card issuer may be notified of loss or theft of the card. The notice shall state that the cardholder's liability shall not exceed $50 (or any lesser amount) and that the cardholder may give oral or written notification, and shall describe a means of notification (for example, a telephone number, an address, or both); and

[23] *Adequate notice* means a printed notice to a cardholder that sets forth clearly the pertinent facts so that the cardholder may reasonably be expected to have noticed it and understood its meaning. The notice may be given by any means reasonably assuring receipt by the cardholder.

(iii) The card issuer has provided a means to identify the cardholder on the account or the authorized user of the card.

(3) *Notification to card issuer.* Notification to a card issuer is given when steps have been taken as may be reasonably required in the ordinary course of business to provide the card issuer with

the pertinent information about the loss, theft, or possible unauthorized use of a credit card, regardless of whether any particular officer, employee, or agent of the card issuer does, in fact, receive the information. Notification may be given, at the option of the person giving it, in person, by telephone, or in writing. Notification in writing is considered given at the time of receipt or, whether or not received, at the expiration of the time ordinarily required for transmission, whichever is earlier.

(4) *Effect of other applicable law or agreement.* If state law or an agreement between a cardholder and the card issuer imposes lesser liability than that provided in this paragraph, the lesser liability shall govern.

(5) *Business use of credit cards.* If 10 or more credit cards are issued by one card issuer for use by the employees of an organization, this section does not prohibit the card issuer and the organization from agreeing to liability for unauthorized use without regard to this section. However, liability for unauthorized use may be imposed on an employee of the organization, by either the card issuer or the organization, only in accordance with this section.

(c) *Right of cardholder to assert claims or defenses against card issuer* [24] —
(1) *General rule.* When a person who honors a credit card fails to resolve satisfactorily a dispute

as to property or services purchased with the credit card in a consumer credit transaction, the cardholder may assert against the card issuer all claims (other than tort claims) and defenses arising out of the transaction and relating to the failure to resolve the dispute. The cardholder may withhold payment up to the amount of credit outstanding for the property or services that gave rise to the dispute and any finance or other charges imposed on that amount.[25]

[24] This paragraph does not apply to the use of a check guarantee card or a debit card in connection with an overdraft credit plan, or to a check guarantee card used in connection with cash advance checks.

[25] The amount of the claim or defense that the cardholder may assert shall not exceed the amount of credit outstanding for the disputed transaction at the time the cardholder first notifies the card issuer or the person honoring the credit card of the existence of the claim or defense. To determine the amount of credit outstanding for purposes of this section, payments and other credits shall be applied to: (1) Late charges in the order of entry to the account; then to (2) finance charges in the order of entry to the account; and then to (3) any other debits in the order of entry to the account. If more than one item is included in a single extension of credit, credits are to be distributed pro rata according to prices and applicable taxes.

(2) *Adverse credit reports prohibited.* If, in accordance with paragraph (c)(1) of this section,

the cardholder withholds payment of the amount of credit outstanding for the disputed transaction, the card issuer shall not report that amount as delinquent until the dispute is settled or judgment is rendered.

(3) *Limitations.* The rights stated in paragraphs (c)(1) and (2) of this section apply only if:

(i) The cardholder has made a good faith attempt to resolve the dispute with the person honoring the credit card; and

(ii) The amount of credit extended to obtain the property or services that result in the assertion of the claim or defense by the cardholder exceeds $50, and the disputed transaction occurred in the same state as the cardholder's current designated address or, if not within the same state, within 100 miles from that address.[26]

[26] The limitations stated in paragraph (c)(3)(ii) of this section shall not apply when the person honoring the credit card: (1) Is the same person as the card issuer; (2) is controlled by the card issuer directly or indirectly; (3) is under the direct or indirect control of a third person that also directly or indirectly controls the card issuer; (4) controls the card issuer directly or indirectly;

(5) is a franchised dealer in the card issuer's products or services; or (6) has obtained the order for the disputed transaction through a mail solicitation made or participated in by the card issuer.

(d) *Offsets by card issuer prohibited.*
(1) A card issuer may not take any action, either before or after termination of credit card privileges, to offset a cardholder's indebtedness arising from a consumer credit transaction under the relevant credit card plan against funds of the cardholder held on deposit with the card issuer.

(2) This paragraph does not alter or affect the right of a card issuer acting under state or Federal law to do any of the following with regard to funds of a cardholder held on deposit with the card issuer if the same procedure is constitutionally available to creditors generally: obtain or enforce a consensual security interest in the funds; attach or otherwise levy upon the funds; or obtain or enforce a court order relating to the funds.

(3) This paragraph does not prohibit a plan, if authorized in writing by the cardholder, under which the card issuer may periodically deduct all or part of the cardholder's credit card debt from a deposit account held with the card issuer (subject to the limitations in §226.13(d)(1)).

(e) *Prompt notification of returns and crediting of refunds.*
(1) When a creditor other than the card issuer accepts the return of property or forgives a debt for services that is to be reflected as a credit to the consumer's credit card account, that creditor shall, within 7 business days from accepting the

return or forgiving the debt, transmit a credit statement to the card issuer through the card issuer's normal channels for credit statements.

(2) The card issuer shall, within 3 business days from receipt of a credit statement, credit the consumer's account with the amount of the refund.

(3) If a creditor other than a card issuer routinely gives cash refunds to consumers paying in cash, the creditor shall also give credit or cash refunds to consumers using credit cards, unless it discloses at the time the transaction is consummated that credit or cash refunds for returns are not given. This section does not require refunds for returns nor does it prohibit refunds in kind.

(f) *Discounts; tie-in arrangements.* No card issuer may, by contract or otherwise:
(1) Prohibit any person who honors a credit card from offering a discount to a consumer to induce the consumer to pay by cash, check, or similar means rather than by use of a credit card or its underlying account for the purchase of property or services; or

(2) Require any person who honors the card issuer's credit card to open or maintain any account or obtain any other service not essential to the operation of the credit card plan from the card issuer or any other person, as a condition of

participation in a credit card plan. If maintenance of an account for clearing purposes is determined to be essential to the operation of the credit card plan, it may be required only if no service charges or minimum balance requirements are imposed.

(g) *Relation to Electronic Fund Transfer Act and Regulation E.* For guidance on whether Regulation Z (12 CFR part 226) or Regulation E (12 CFR part 205) applies in instances involving both credit and electronic fund transfer aspects, refer to Regulation E, 12 CFR 205.12(a) regarding issuance and liability for unauthorized use. On matters other than issuance and liability, this section applies to the credit aspects of combined credit/electronic fund transfer transactions, as applicable.

12 C.F.R. § 226.13
Billing error resolution.[27]

(a) *Definition of billing error.* For purposes of this section, the term *billing error* means:

[27] A creditor shall not accelerate any part of the consumer's indebtedness or restrict or close a consumer's account solely because the consumer has exercised in good faith rights provided by this section. A creditor may be subject to the forfeiture penalty under section 161(e) of the Act for failure to comply with any of the requirements of this section.

(1) A reflection on or with a periodic statement of an extension of credit that is not made to the consumer or to a person who has actual, implied, or apparent authority to use the consumer's credit card or open-end credit plan.

(2) A reflection on or with a periodic statement of an extension of credit that is not identified in accordance with the requirements of §§226.7(b) and 226.8.

(3) A reflection on or with a periodic statement of an extension of credit for property or services not accepted by the consumer or the consumer's designee, or not delivered to the consumer or the consumer's designee as agreed.

(4) A reflection on a periodic statement of the creditor's failure to credit properly a payment or other credit issued to the consumer's account.

(5) A reflection on a periodic statement of a computational or similar error of an accounting nature that is made by the creditor.

(6) A reflection on a periodic statement of an extension of credit for which the consumer requests additional clarification, including documentary evidence.

(7) The creditor's failure to mail or deliver a periodic statement to the consumer's last known address if that address was received by the creditor, in writing, at least 20 days before the

end of the billing cycle for which the statement was required.

(b) *Billing error notice.* [28] A billing error notice is a written notice[29] from a consumer that:

[28] The creditor need not comply with the requirements of paragraphs (c) through (g) of this section if the consumer concludes that no billing error occurred and voluntarily withdraws the billing error notice.

[29] The creditor may require that the written notice not be made on the payment medium or other material accompanying the periodic statement if the creditor so stipulates in the billing rights statement required by §§226.6(d) and 226.9(a).

(1) Is received by a creditor at the address disclosed under §226.7(k) no later than 60 days after the creditor transmitted the first periodic statement that reflects the alleged billing error;

(2) Enables the creditor to identify the consumer's name and account number; and

(3) To the extent possible, indicates the consumer's belief and the reasons for the belief that a billing error exists, and the type, date, and amount of the error.

(c) *Time for resolution; general procedures.*

(1) The creditor shall mail or deliver written acknowledgment to the consumer within 30 days

of receiving a billing error notice, unless the creditor has complied with the appropriate resolution procedures of paragraphs (e) and (f) of this section, as applicable, within the 30-day period; and

(2) The creditor shall comply with the appropriate resolution procedures of paragraphs (e) and (f) of this section, as applicable, within 2 complete billing cycles (but in no event later than 90 days) after receiving a billing error notice.

(d) *Rules pending resolution.* Until a billing error is resolved under paragraph (e) or (f) of this section, the following rules apply:

(1) *Consumer's right to withhold disputed amount; collection action prohibited.* The consumer need not pay (and the creditor may not try to collect) any portion of any required payment that the consumer believes is related to the disputed amount (including related finance or other charges).[30] If the cardholder maintains a deposit account with the card issuer and has agreed to pay the credit card indebtedness by periodic deductions from the cardholder's deposit account, the card issuer shall not deduct any part of the disputed amount or related finance or other charges if a billing error notice is received any time up to 3 business days before the scheduled payment date.

[30] A creditor is not prohibited from taking action to collect any undisputed portion of the item or

bill; from deducting any disputed amount and related finance or other charges from the consumer's credit limit on the account; or from reflecting a disputed amount and related finance or other charges on a periodic statement, provided that the creditor indicates on or with the periodic statement that payment of any disputed amount and related finance or other charges is not required pending the creditor's compliance with this section.

(2) *Adverse credit reports prohibited.* The creditor or its agent shall not (directly or indirectly) make or threaten to make an adverse report to any person about the consumer's credit standing, or report that an amount or account is delinquent, because the consumer failed to pay the disputed amount or related finance or other charges.

(e) *Procedures if billing error occurred as asserted.* If a creditor determines that a billing error occurred as asserted, it shall within the time limits in paragraph (c)(2) of this section:

(1) Correct the billing error and credit the consumer's account with any disputed amount and related finance or other charges, as applicable; and

(2) Mail or deliver a correction notice to the consumer.

(f) *Procedures if different billing error or no billing error occurred.* If, after conducting a reasonable investigation,[31] a creditor determines that no billing error occurred or that a different billing error occurred from that asserted, the creditor shall within the time limits in paragraph (c)(2) of this section:

[31] If a consumer submits a billing error notice alleging either the nondelivery of property or services under paragraph (a)(3) of this section or that information appearing on a periodic statement is incorrect because a person honoring the consumer's credit card has made an incorrect report to the card issuer, the creditor shall not deny the assertion unless it conducts a reasonable investigation and determines that the property or services were actually delivered, mailed, or sent as agreed or that the information was correct.

(1) Mail or deliver to the consumer an explanation that sets forth the reasons for the creditor's belief that the billing error alleged by the consumer is incorrect in whole or in part;

(2) Furnish copies of documentary evidence of the consumer's indebtedness, if the consumer so requests; and

(3) If a different billing error occurred, correct the billing error and credit the consumer's account with any disputed amount and related finance or other charges, as applicable.

(g) *Creditor's rights and duties after resolution.* If a creditor, after complying with all of the requirements of this section, determines that a consumer owes all or part of the disputed amount and related finance or other charges, the creditor:

(1) Shall promptly notify the consumer in writing of the time when payment is due and the portion of the disputed amount and related finance or other charges that the consumer still owes;

(2) Shall allow any time period disclosed under §§226.6(a)(1) and 226.7(j), during which the consumer can pay the amount due under paragraph (g)(1) of this section without incurring additional finance or other charges;

(3) May report an account or amount as delinquent because the amount due under paragraph (g)(1) of this section remains unpaid after the creditor has allowed any time period disclosed under §§226.6(a)(1) and 266.7(j) or 10 days (whichever is longer) during which the consumer can pay the amount; but

(4) May not report that an amount or account is delinquent because the amount due under paragraph (g)(1) of the section remains unpaid, if the creditor receives (within the time allowed for payment in paragraph (g)(3) of this section) further written notice from the consumer that any portion of the billing error is still in dispute, unless the creditor also:

(i) Promptly reports that the amount or account is in dispute;

(ii) Mails or delivers to the consumer (at the same time the report is made) a written notice of the name and address of each person to whom the creditor makes a report; and

(iii) Promptly reports any subsequent resolution of the reported delinquency to all persons to whom the creditor has made a report.

(h) *Reassertion of billing error.* A creditor that has fully complied with the requirements of this section has no further responsibilities under this section (other than as provided in paragraph (g)(4) of this section) if a consumer reasserts substantially the same billing error.

(i) *Relation to Electronic Fund Transfer Act and Regulation E.* If an extension of credit is incident to an electronic fund transfer, under an agreement between a consumer and a financial institution to extend credit when the consumer's account is overdrawn or to maintain a specified minimum balance in the consumer's account, the creditor shall comply with the requirements of Regulation E, 12 CFR 205.11 governing error resolution rather than those of paragraphs (a), (b), (c), (e), (f), and (h) of this section.

Exhibit G

Relevant Provisions of Federal Reserve Board's
Truth in Lending Official Staff Commentary to
Regulation Z

Section 226.12 - Special Credit Card Provisions

12 C.F.R. Pt. 226, Supp. I, § 226.12, ¶ 12(b)(3)

Reasonable investigation. If a card issuer seeks to impose liability when a claim of unauthorized use is made by a cardholder, the card issuer must conduct a reasonable investigation of the claim. In conducting its investigation, the card issuer may reasonably request the cardholder's cooperation. The card issuer may not automatically deny a claim based solely on the cardholder's failure or refusal to comply with a

particular request; however, if the card issuer otherwise has no knowledge of facts confirming the unauthorized use, the lack of information resulting from the cardholder's failure or refusal to comply with a particular request may lead the card issuer reasonably to terminate the {{6-30-05 p.6916.02}} investigation. The procedures involved in investigating claims may differ, but actions such as the following represent steps that a card issuer may take, as appropriate, in conducting a reasonable investigation:

i. Reviewing the types or amounts of purchases made in relation to the cardholder's previous purchasing pattern.

ii. Reviewing where the purchases were delivered in relation to the cardholder's residence or place of business.

iii. Reviewing where the purchases were made in relation to where the cardholder resides or has normally shopped.

iv. Comparing any signature on credit slips for the purchases to the signature of the cardholder or an authorized user in the card issuer's records, including other credit slips.

v. Requesting documentation to assist in the verification of the claim.

vi. Requesting a written, signed statement from the cardholder or authorized user.

vii. Requesting a copy of a police report, if one was filed.

viii. Requesting information regarding the cardholder's knowledge of the person who allegedly used the card or of that person's authority to do so.

12 C.F.R. Pt. 226, Supp. I, § 226.12, ¶ 12(b)(1)(1)

12(b)(1) Limitation on amount.

1. *Meaning of "authority."* Footnote 22 defines unauthorized use in terms of whether the user has "actual, implied, or apparent authority." Whether such authority exists must be determined under state or other applicable law.

12 C.F.R. Pt. 226, Supp. I, § 226.12, ¶ 12(b)(2)(iii)(1)

Paragraph 12(b)(2)(iii).

1. *Means of identifying cardholder or user.* To fulfill the condition set forth in § 226.12(b)(2)(iii), the issuer must provide some method whereby the cardholder or the authorized user can be identified. This could include, for example, signature, photograph, or fingerprint on the card, or electronic or mechanical confirmation.

12 C.F.R. Pt. 226, Supp. I, § 226.12, ¶ 12(b)(2)(iii)(3)

3. *Transactions not involving card.* The cardholder may not be held liable under § 226.12(b) when the card itself (or some other sufficient means of identification of the cardholder) is not presented. Since the issuer has

not provided a means to identify the user under these circumstances, the issuer has not fulfilled one of the conditions for imposing liability. For example, when merchandise is ordered by telephone by a person without authority to do so, using a credit card account number or other number only (which may be widely available), no liability may be imposed on the cardholder.

Exhibit H

Relevant Provisions of the VISA By-laws and Operating Regulations
Published May 15, 2003

Section 1.13.B.4.b

Without regard to *Section 1.13.A*, liability to indemnify Visa for claims or liabilities arising from or in connection with, the V.I.P. System, including, without limitation, the PIN Verification Servive, Key Management Service, VisaNet Access Resumption Service, BackOffice Adjustment System, Terminal Standardization Program, or the SingleConnect Service will be allocated between issuers and acquirers as follows:

- Issuers have primary responsibility for, and indemnify Visa against, Claims or Liabilities arising from Cardholders

Section 2.3.C.1
Member Responsibilities

A Member must, to the best of its ability, assist other Members with an investigation of fraudulent activity with a Visa Card, Electron Card, or Visa Electron Card by performing tasks such as:

- Interviewing Merchants, Sponsored Merchants, Cardholders, suspects, witnesses, and law enforcement personnel

Section 2.3.F.4.a
Investigations

A member must conduct a thorough investigation of the suspected or confirmed loss or theft of account information or laundering of Sales Drafts.

Section 4.2.A.1.a
Acquirer Responsibilities

An acquirer is responsible for Visa Transactions it submits into Interchange including, but not limited to, any Transaction properly charged back by an Issuer, regardless of its ability to return the Transaction to the Merchant for any reason.

Section 2.03
General Obligations of Membership

(a) As used in the By-Laws:

(17) To "issue"

- Cards means to enter into direct contractual relationships as the principal party with holders of Cards, to maintain and service such relationships, and either (i) extend credit to and collect credit from such cardholders, (ii) purchase accounts receivable due from and collect balances of such accounts from cardholders, (iii) debit deposit accounts of such cardholders in connection with transactions arising out of the use of such Cards, or (iv) guarantee the payment of checks or similar instruments through the use of such Cards;

(b) In addition to the specific requirements for each category of membership, stated in *Section 2.04* of the By-Laws, every member:

(1) Shall comply with the Certificate of Incorporation, the By-Laws and Operating Regulations, and all amendments to any of them, and have the rights and privileges stated there;

(7) Shall be responsible for the proper performance pursuant to the By-Laws and Operating Regulations of each of its merchants;

2.4.J FRAUD REPORTING

2.4.J.1 **Fraud Activity Categories**

Visa U.S.A. defines the following Fraud Activity reporting categories:

Table 2-6: Fraud Activity Reporting Categories

Fraud Type	Category	This Category is Used For
6	Fraudulent Use of an account number (Mail/ Phone Order Fraud	Transactions generated by fraudulent use of an account number in which the Card is not present